BISHOP'S

NEW CRIMINAL PROCEDURE

VOL. III

NEW CRIMINAL PROCEDURE

OR

NEW COMMENTARIES

ON THE LAW OF

PLEADING AND EVIDENCE

AND

THE PRACTICE

IN

CRIMINAL CASES

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CONTENTS OF VOLUME III

BOOK XII.

SPECIFIC OFFENCES AND THEIR INCIDENTS.

NEW CRIMINAL PROCEDURE.

BOOK XII.

SPECIFIC OFFENCES AND THEIR INCIDENTS.

For ABDUCTION OF WOMEN, as to both law and procedure, see Stat. Crimes. And see SEDUCTION OF WOMEN in Stat. Crimes.
ABORTION, as to both law and procedure, see Stat. Crimes.

CHAPTER XCVI.

THE ACCESSORY AND THE LIKE.

Consult—for the law of this subject, New Crim. Law, I, § 644-708. For the forms and the like, Dir. & F., § 113-118. And see the Indexes to New Crim. Law and to this work for various connected questions.

§ 1. 1. **In this Chapter**—we include with accessories proper, as technically known in felony, persons in the like relation to the direct doer in treason, petit larceny, and misdemeanor.

2. **The Principle**—on which the subject of this chapter proceeds was explained in the first volume; namely, that whenever one person's evil intent and another's criminal act combine, the allegation against the former may be either

direct, that he did the thing, according to its legal effect, or indirect, that he instigated or procured the other to do it, according to its outward form, and he did it. Whichever method is used in the averment, the proof may be that the defendant employed his parsonal volition, or that he instigated another who did the act, as may be the more convenient to the practitioner. The exception is that in felony by instigation the instigator must be charged as an accessory before the fact, if he was absent, or not actually or constructively present, at the doing,—a rule which in many of our States has been abrogated by statutes.[1]

3. **How divided.**—Assuming the law of the subject as explained in "New Criminal Law" to be understood by the reader, we shall consider, I. The Pleading; II. The Evidence.

I. *The Pleading.*

§ 2. 1. **Two Classes.**—To make the distinctions of this sub-title plain, we need separate the offences only into two classes,[2]—

First. *In Treason, Petit Larceny, and Misdemeanor*:—

2. **Relations of Doer and Procurer.**—One who does a thing on procurement of another is, in civil jurisprudence, termed the agent, and the procurer the principal. But in

1. Vol. I, §§ 332-334; Vol. II, §§ 468 (3), 488d, 488e. See also New Crim. Law, I, §§ 648, 649, 653, 656, 663, 670, 673, 675, 682, 685; S. v. Patterson, 52 Kan. 335, 34 P. 284, 15 So. 543; Everett v. S., 33 Fla. 661, 15 So. 543; Albritton v. S., 32 Fla. 358, 13 So. 955; C. v. Hollister, 157 Pa. 13, 27 A. 386; Hughes v. S., 75 Ala. 31; Morrow v. S., 14 Lea, 475; Phillips v. S., 26 Tex. Ap. 228, 8 Am. St. 471; Sanders v. S., 74 Ga. 82; Heard v. S., 9 Tex. Ap. 1; Troutman v. S., 20 Vroom, 33; Smith v. S., 37 Ark. 274; Campbell v. C., 84 Pa. 187; P. v. Bliven, 112 N. Y. 79, 8 Am. St. 701, 19 N. E. 638; S. v. Rucker, 93 Mo. 88, 5 S. W. 609; Walrath v. S., 8 Neb. 80; S. v. Jordan, 110 N. C. 491; Hronek v. P., 134 Ill. 139, 23 Am. St. 652, 656, 24 N. E. 861; Skiles v. S., 85 Neb. 401, 123 N. W. 447; Moore v. S., 4 Okla. Cr. 212, 111 P. 822; Morris v. S., 4 Okla. Cr. 233, 111 P. 1096; S. v. Burns, 82 Conn. 213, 72 A. 1083; Lancaster v. S., 2 Okla. Cr. 681, 103 P. 1065.

2. See, for the law of the subject of this chapter, New Crim. Law, I, §§ 644- 708.

the criminal law, agency never excuses an act;[3] therefore the agent is known and holden as principal equally with him who proceeds self-moved. The procurer is a principal also if the thing is treason, petit larceny, or misdemeanor;[3a] and—

3. **Election of Methods.**—In these classes of criminal cases, procurers and doers may be joined in one indictment, or they may be indicted separately, at the election of the prosecuting power. And a procurer may be charged as doer, precisely as though his own volition had executed the criminal act; or, at such election, the act of the doer may be set out, and then it may be added that he caused and procured the doing.[4] "But—

4. **Accessory After.**—"Where," says Starkie, "a person becomes a traitor by harboring and receiving another who has committed treason, the indictment must be specially framed for the receipt, and not for the principal treason."[5] Not always in misdemeanor is such help indictable; when it is, the allegation must be in like form.[6]

§ 3. Secondly. *In Felony other than Petit Larceny:*—

3. New Crim. Law, I, §§ 355 (1), 658; Thompson v. S., 105 Tenn. 177, 51 L. R. A. 883, 58 S. W. 213; Cox v. S., 3 Okla. Cr. 129, 104 P. 1074, 105 P. 369; Ollre v. S., 57 Tex. Cr. 570, 123 S. W. 1116; Loeb v. S., 6 Ga. Ap. 23, 64 S. E. 338; P. v. Dunlap, 66 N. Y. S. 161, 32 Misc. 390, 15 N. Y. Cr. 149; Com. v. Kolb, 13 Pa. Super. Ct. 347; Douglas v. S., 18 Ind. Ap. 289, 48 N. E. 9.

3a. U. S. v. Martin, 176 Fed. 110; S. v. Warady, 78 N. J. L. 687, 75 A. 977; S. v. Wilson, 79 N. J. L. 241, 75 A. 776; Richardson v. U. S., 181 Fed. 1; S. v. Rawland Lumber Co., 153 N. C. 610, 69 S. E. 58; Com. v. Bottom, 140 Ky. 212, 130 S. W. 1091; Christian v. S., 8 Ga. Ap. 371, 70 S. E. 258; Reynolds v. Publishers, 155 Mo. Ap. 612, 135 S. W. 103; Burrow v. Hot Springs, 85 Ark. 396, 108 S. W. 323; P. v. Acritelli, 110 N. Y. S. 540, 57 Misc. 574.

4. Vol. I, §§ 332, 333, and other places cited ante, § 1 (2); New Crim Law, I, §§ 679-689; 1 Stark. Crim. Pl. (3d Ed.) 81; Baker v. S., 12 Ohio St. 214; Dunman v. S., 1 Tex. Ap. 593; Clifton v. S., 53 Ga. 241; Scully v. S., 39 Ala. 240. See also C. v. Gannett, 1 Allen, 7, 79 Am. D. 693; Thompson v. S., 5 Humph. 138; Hartshorn v. S., 29 Ohio St. 635; S. v. Clayton, 11 Rich. 581.

5. 1 Stark. Crim. Pl. (2d Ed.) 81, referring to Foster, 345. See New Crim. Law, I, §§ 701-704.

6. New Crim. Law, I, §§ 705-708. And see McCoy v. S., 52 Ga. 287.

1. **First and Second Degrees.**—Even in these offences, where the procurer of a criminal act which is done in his absence is not a principal, but an accessory before the fact, the law does not distinguish between principals of the first and second degrees.[7] Hence,—

2. **Illustrations.**—Says Starkie,[8] "Where A and B are present, and A commits an offence in which B aids and assists him, the indictment may either allege the matter according to the fact, or charge them both as principals in the first degree;[9] for the act of one is the act of the other.[10] And upon such an indictment, B, who was present aiding and abetting, may be convicted, though A is acquitted.[11] So A and B, if present aiding and abetting, may be convicted, though C, a person not named in the indictment, committed the act.[12] Again, if an indictment for murder

7. New Crim. Law. I, § 648.

8. 1 Stark. Crim. Pl. (2d Ed.) 81.

9. Foster, 351, 425; 2 Hawk. P. C. c. 23, § 76; 2 Hale P. C. 344.

10. 2 Hawk. P. C. c. 23, § 76; Young v. Rex, 3 T. R. 98, 105.

11. Foster, 351; 1 Hale P. C. 437, 463; 2 Hale P. C. 185, 292, 344, 345; 2 Hawk. P. C. c. 46, § 185; Mackalley's Case, 9 Co. 65, 67; S. v. Phillips, 24 Mo. 475; S. v. Davis, 88 S. C. 204, 70 S. E. 417; P. v. Pisano, 127 N. Y. S. 204, 142 A. D. 524, 23 N. Y. Cr. 260; Butler v. S. (Tex. 1911), 134 S. W. 230; Jackson v. Com., 100 Ky. 239, 38 S. W. 422, 18 Ky. L. 795, 66 Ann. St. 666; Taylor v. Com., 90 S. W. 581, 28 Ky. L. 819; Hatfield v. Com., 21 Ky. L. 1461, 55 S. W. 679.

12. Rex v. Borthwick, 1 Doug. 207; Rex v. Plummer, J. Kel. 109. The case of Mulligan v. C., 84 Ky. 229, 1 S. W. 417, not well considered, seems contrary to this doctrine. Bennett, J. at p. 236 observes: "In Mr. Bishop's Criminal Procedure, vol. 2, p. 3, he states that the aider and abettor may be indicted and tried without naming the principal in the indictment. He refers to but one case to support that view, to wit: Rex v. Borthwick, 1 Doug. 207. That case does not treat of the question at all, but by inference it is an authority against the view taken by Mr. Bishop." The reader will observe, what the learned judge overlooked, that the authority to which Bishop here refers, is not Rex v. Borthwick, but the treatise of Starkie, which is always regarded as sufficient authority for anything. Bishop does not rely on Rex v. Borthwick, or on Rex v. Plummer, both of which Starkie cites, and I felt it just to Starkie to retain his citations. But it is immaterial whether or not these cases sustain his text; since no author's text is wrong simply if it is not supported by what he cites, as it may rest on

charge that A gave the moral stroke, and that B was present aiding and abetting, both A and B may be convicted, though it turn out that B struck the blow, and that A was present aiding and abetting.[13] To go one step further, upon a similar indictment, charging A as a principal in the first degree, and B as present aiding and abetting, B may be convicted though A be acquitted."[14] And,—

§ 4. Accessory before, under Statutes.—As already seen,[15] the statutes in some of our States, by their terms or by construction, make the accessory before the fact in felony a principal; thus, he "shall be deemed and considered as principal, and punished accordingly." Under which

other authority or on irrefragable reason. And Starkie is an authority of himself. Still, if what he sets down here is not abundantly supported by the authorities which I have given in the preceding paragraphs of this chapter, nothing in the law has the support of authority. If, as it is held in all pleadings civil and criminal, you may allege a thing according to its legal effect instead of its outward form unless something special forbids, you may charge as doer one who is such only because his mind contributed to another's doing, you are not obliged to name the other, or in any way to notice him. Such is an allegation after the legal effect. The reader will observe that we are here considering the form of charge against the principal of the second degree, not against the accessory before the fact in felony, which is altogether a different thing. And see Dir. & F. §§ 115, 116; P. v. Bliven, 112 N. Y. 79, 8 Am. St. 701, 19 N. E. 638; Albritton v. S., 32 Fla. 358, 13 So. 955; S. v. Patterson, 52 Kan. 335, 34 P. 784.

13. Benson v. Offley, 2 Show. 510, 3 Mod. 121; Foster, 351; 1 Hale P. C. 437, 463; 2 Hale P. C. 344, 345; Jackson v. Com., 100 Ky. 239, 38 S. W. 422, 18 Ky. L. 795, 66 Am. St. 336; Hatfield v. Com., 21 Ky. L. 1461, 55 S. W. 679.

14. Reg v. Wallis, 1 Salk. 334; 1 Hawk. P. C. (6th Ed.) c. 31, § 46, note; Rex v. Taylor, 1 Leach, 360. See New Crim. Law, I, § 648; P. v. Bearss, 10 Cal. 68; S. v. Davis, 29 Mo. 391; Reg. v. Downing, 1 Den. C. C. 52, 1 Cox C. C. 156, 2 Car. & K. 382; Rex v. Culkin, 5 Car. & P. 121; Kessler v. C., 12 Bush, 18; S. v. Cook, 20 La. Ann. 145; Clay v. S., 40 Tex. 67; Coates v. P., 72 Ill. 303, 304; Hansford v. S., 54 Ga. 55; C. v. Fortune, 105 Mass. 592; Reg. v. O'Brian, 1 Den. C. C. 9, 2 Car. & K. 115; S. v. Jenkins, 14 Rich. 215, 94 Am. D. 132; S. v. Thompson, 13 La. Ann. 515; S. v. Hollenscheit, 61 Mo. 302. See, and query, Reg. v. Tyler, 8 Car. & P. 616; Steeley v. Com. (Ky. 1909), 116 S. W. 714; Vance v. Com., 115 S. W. 774; S. v. Yoho, 64 W. Va. 250, 61 S. E. 367.

15. Ante, § 1 (2).

provision, the proof against one charged as principal may be that he was an accessory before the fact; or the pleader may state the offence in its outward form; "as," said the court, "it is in an indictment against an accessory before or at the fact;" concluding, however, in a murder case, "as for murder, for that is really the offence of which the party is guilty, if at all."[16] This sort of provision differs somewhat in the States which have adopted it, therefore its effect, while it may be the same as the above, though its terms are not, will not be alike in all.[17] Therefore it is the safe course for a pleader, in a State where the decisions have not spoken, to draw his indictment on the special facts, and in the statutory words.[18]

16. Baxter v. P., 3 Gilman, 368, 381, 382; reaffirmed, Dempsey v. P., 47 Ill. 323; Yoe v. P., 49 Ill. 410; Coates v. P., 72 Ill. 303.

17. P. v. Davidson, 5 Cal. 133; Bonsell v. U. S., 1 Greene (Iowa), 111; P. v. Trim, 39 Cal. 75; S. v. Zeibart, 40 Iowa, 169; S. v. Chapman, 6 Nev. 320; S. v. Cassidy, 12 Kan. 550; Wicks v. S., 44 Ala. 398; Tully v. C., 11 Bush, 154; Thompson v. C., 1 Met. (Ky). 13; Josephine v. S., 39 Miss. 613; Shannon v. P., 5 Mich. 71, 86, 88; S. v. Ricker, 29 Me. 84; S. v. Jordan, 110 N. C. 491; P. v. Bliven, 112 N. Y. 79, 8 Am. St. 701, 19 N. E. 638; Campbell v. C., 84 Pa. 187; Smith v. S., 37 Ark. 274; Williams v. S., 41 Ark. 173; Hughes v. S., 75 Ala. 31; S. v. Whitt, 113 N. C. 716; Uselton v. P., 149 Ill. 612; S. v. Patterson, 52 Kan. 335, 34 P. 784; Reg. v. Manning, 2 Car. & K. 887, 903, note; see McMahan v. S., 168 Ala. 70, 53 So. 89 (Code 1907) § 6219; S. v. McAllister, 7 Pen. (Del.) 301, 76 A. 226; S. v. Wilson, 79 N. J. 241, 75 A. 776; Ex parte Smith (Nev. 1910), 111 P. 930, 938; S. v. Lewis, 51 Ore. 467, 94 P. 831; T. v. DeWolfe, 29 Mont. 415, 74 P. 1084; P. v. Mills, 41 Miss. 195, 83 N. Y. S. 947, 17 N. Y. Cr. 466; aff'd in 86 N. Y. S. 529, 91 A. D. 331, 18 N. Y. Cr. 125, 70 N. E. 786, 178 N. Y. 274, 67 L. R. A. 231; Drury v. Ter., 9 Okla. 398, 60 P. 101; Pearce v. Ter., 11 Okla. 438, 68 P. 504.

18. Vol. II, §§ 612, 623. Under the statute abolishing the distinction between principals and accessories an accessory before the fact may be charged directly as a principal, P. v. Nolan, 144 Cal. 75, 77 P. 774; S. v. Briggs, 84 Minn. 357, 87 N. W. 935; Pearce v. Ter., 11 Okla. 438, 68 P. 504. An indictment against the accessory must allege sufficiently the principal's guilt or his conviction, Daugherty v. S., 46 Fla. 109, 110 Am. St. 84, 35 So. 397; Tully v. Com., 74 Ky. 154; S. v. King, 88 Minn. 175, 92 N. W. 965; also the time and place when the defendant became an accessory, S. v. Burbage, 51 S. C. 284, 28 S. E. 937; but it need not set forth the means by which the accessory after the fact assisted,

§ 5. 1. Principal of Second Degree, Outward Fact.— Where the pleader elects to charge the principal of the second degree according to the outward fact, he sets out the offence of the principal of the first degree as though he alone were concerned in it, and adds that the principal of the second degree "then and there feloniously was present, aiding, abetting, and assisting the said," &c. of the first degree; adding the same ordinary conclusion [19] as when the count is against any other joint offenders.[20]

P. v. Seldner, 62 A. D. 357, 71 N. Y. S. 35; S. v. Neddo, 92 Me. 71, 42 A. 253; Gann v. S., 42 Tex. Cr. 133, 57 S. W. 857; Woods v. S. (Tex. 1900), 60 S. W. 244.

19. Vol. I, § 429; Vol. II, § 467 et seq.; Dir. & F. 115; Montague v. S., 17 Fla. 662; Taylor v. Com., 90 S. W. 581, 28 Ky. L. 819.

20. Archb. Crim. Pl. & Ev. (13th Ed.) 797; 2 Chit. Crim. Law, 4, 5. It is safer to lay the time and place by the words "then and there" than by repeating the date and venue. Vol. I, § 412. The indictment in Chitty, ut sup., in a case of Homicide,— is well, though the form differs from some others. It first names both defendants; then charges that they, "then and there being, feloniously and wilfully and of their malice aforethought did make an assault;" next, it sets out the acts of the principal of the first degree, as against him alone; lastly, it proceeds, "of which said mortal wound the said A. B. did then and there instantly die; and that the said E. F. (the principal of the second degree), then and there, feloniously, wilfully, and of his malice aforethought, was present, aiding, helping, abetting, comforting, assisting, and maintaining the said C. D. (the principal of the first degree) in the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And the jurors aforesaid, upon their oath aforesaid do say that the said C. D. and E. F. him the said A. B., in manner and form aforesaid, feloniously, wilfully, and of their malice aforesaid, did kill and murder, against the peace," etc. See also S. v. Pile, 5 Ala. 72; Parker's Case, 2 Dy. 186a. Where the averment of aiding was without mention of place, but time and place was alleged to the stroke and death, it being added that the prisoners were then present aiding and abetting, the allegation of venue was held sufficient. S. v. Taylor, 21 Mo. 477. According to Heydon's Case, 4 Co. 41a, if the allegation is that the principal of the first degree gave the mortal blow on a day named, and death followed on a subsequent day named, then that on the former day the principals of the second degree were present at the "felony and murder," the indictment as to these principals is "repugnant and insufficient," "for no felony was committed till the death, and none shall be adjudged a felon by relation." And the judges said "they had often adjudged indictments insufficient when the

2. **All One Count.**—In these cases, and those wherein, under a like form, the accessory whether before or after the fact is indicted with the principal, the whole allegation constitutes only one count, with one conclusion, not two.[21] And so may be even an indictment for misdemeanor.[22]

§ 6. **Presence.**—Since one to be a principal in the second degree must be actually or constructively "present" at the commission of the offense,[23] the indictment must allege such

stroke is one day and the death another, and the jury concluded the murder or homicide to be committed the first day; but they said that in the case at bar the indictment should be that the said praesentes et abettantes fuerunt praesentes, auxiliantes, etc., ad feloniam et murdrum praed. in forma praed. faciend." There may be doubt whether all courts at the present day would hold thus. See Vol. I, §§ 51, 52; New Crim. Law, I, §§ 113-116. In an English case before Patteson, J., the indictment for manslaughter charged that A gave, at P., in the county of M., mortal blows to the deceased, who languished and died at D, in the county of K.; and that the prisoner was then and there aiding. This was ruled to be good; the word being referred to P., in the county of M. Rex v. Hargrave, 5 Car. & P. 170. And where the allegation was that A. on a day named gave a mortal wound to one who died on subsequent day named, and that B. on the first aforesaid day was present aiding, etc., conviction of both was sustained. Reg. v. O'Brian, 1 Den. C. C. 9, 2 Car. & K. 115. Principals in the first and second degree are not distinguished in an indictment. Lowe v. S., 125 Ga. 55, 53 S. E. 1038.

21. Vol. I, § 449; Vol. II, §§ 467, 468; Rex v. Hartall, 7 Car. & P. 475; Rex v. Haynes, 4 M. & S. 214, 221; S. v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. 877, 882, 883; S. v. Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58; Steeley v. Com., 33 Ky. L. 1032, 112 S. W. 655; S. v. Binkley, 63 W. Va. 668, 60 S. E. 785; S. v. Payton, 90 Mo. 220, 2 S. W. 394; Rawlins v. S., 124 Ga. 1, 52 S. E. 1; Turner v. Sidem, aff'd 201 U. S. 638, 26 S. Ct. 560; Bishop v. S., 118 Ga. 799, 45 S. E. 614; Com. v. Bradley, 16 Pa. Super. Ct. 560; S. v. Roberts, 50 W. Va. 422, 40 S. E. 484. Contra, under statutes. P. v. Lewis, 9 Cal. Ap. 279, 98 P. 1078. It may be charged that the principal committed the crime, and the accessory aided and abetted, S. v. Clark, 60 Kan. 450, 56 P. 767; Cupp v. Com., 9 Ky. L. 877, 87 Ky. 35, 7 S. W. 405. To convict of aiding and abetting the principal must be charged, if known and at least his name stated and the facts of the aiding and abetting set out, Taylor v. Com., 28 Ky. L. 819, 90 S. W. 581, 28 Ky. L. 828, 90 S. W. 584.

22. Rex v. Nelmes, 6 Car. & P. 347.

23. New Crim. Law, I, § 653.

presence.[24]

§ 6 a. Impossible—(Rape—Aggravated Assault).—To aver what is neither legally nor physically possible is, of course, not good. But in reason, it is not ill to charge the principal of the second degree with what he cannot do alone, where he can incur the legal guilt by aiding the principal of the first degree; as, that a man and woman, two defendants, ravished another woman.[25] Yet practically it will be btter to put the allegation, in a case of this sort, according to the outward fact, not the legal; since then certainly the jury will not be perplexed.[26] Still the averment was adjudged sufficient that three defendants did, with a stick of wood which each severally had held in their several right hands, inflict a mortal wound; the learned judge observing that "there is no physical impossibility in the act charged, however improbable it may be." And even were this not so, "our statute," he continued, "makes all accessories at or before the fact principals, and provides that they shall be punished accordingly,"[27]—a provision which as to principals of the second degree, merely affirms the common law.

§ 7. *The Accessory at Common Law:*—

Joinder with Principal.—"It is both usual and proper," says Chitty,[28] to include the accessory and principal "in the same indictment.[29] In this case, if the principal plead the general issue, the accessory will be required to plead also; and if he plead the same plea, both may be tried by the same inquest, but the principal must be first convicted; and

24. 1 Russ. Crimes, 5th Eng. Ed. 164; Heydon's Case, 4 Co. 41a, 42b; P. v. Schwartz, 32 Cal. 160. See Raffety's Case, 2 Lewin, 271; Reg. v. Ramsden, 1 Cox C. C. 37.

25. Russ. Crimes, ut sup.

26. Vol. I, §§ 333, 334. See, also as to Rape, S. v. Burns, 82 Conn. 213, 72 A. 1083; S. v. Harris, 150 Mo. 56, 51 S. W. 481.

27. Coates v. P., 72 Ill. 303. And see post, §§ 59, 89, 515-517.

28. 1 Chit. Crim. Law, 271, 272.

29. Foster, 365; 1 Hale P. C. 623; Burn, Just. Accessories, IV.; Williams, Just. Accessory, V.; Com. Dig. Justices, T. 3.

the jury will be charged, if they find the former not guilty, that the latter must also be acquitted.'' [30]

§ 8. 1. **Form of Indictment—(Accessory before).**—The course is, he continues, for the indictment ''first to state the guilt of the principal as if he alone had been concerned; [31] and then, in case of accessories before the fact, to aver that 'C. D. late of, &c. [the procurer], before the committing of the said felony and murder [or burglary, as the case is] in form aforesaid, to wit, on, &c., at, &c., with force and arms, &c., did maliciously and feloniously incite, move, procure, aid, and abet [or counsel, hire and command] the said A. B. [the principal felon] to do and commit the said felony, in manner aforesaid, against the peace, &c.' [32] And—

2. **Form against Accessory after.**—''Where a man is indicted as an accessory after the fact together with his principal, the original felony is to be stated in the same way, and the conclusion must aver that the accessory 'did receive, harbor, and maintain,' &c., the principal felon, 'well knowing' that he had committed the felony. The averment of knowledge is indispensably requisite; because, without it, the guilt does not manifestly appear.[33] But—

3. **Averring Means, &c.**—''It is in no case necessary to use the word 'accessory' in the indictment,[34] or to set forth the means by which the accessory before the fact incited the principal to commit the felony, or the accessory after received, concealed, or comforted him; for it is perfectly immaterial in what way the purpose of the one was effected, or the harboring of the other secured; and as

30. 1 Hale P. C. 624; 2 Hale P. C. 222, 223; 2 Hawk. P. C. c. 29, § 47; Com. Dig. Justices, T. 3; Burn, Just. Accessory, IV.; Williams, Just. Accessory, V.; Gibson v. S., 53 Tex. Cr. 349, 110 S. W. 41.

31. See ante, § 5 (1); Daughtrey v. S., 46 Fla. 109, 35 So. 397, 110 Am. St. 84.

32. And see C. v. Adams, 127 Mass. 15.

33. 1 Hale P. C. 622; Com. Dig. Justices, T. 2; 2 Hawk. P. C. c. 29, § 33; Burn, Just. Indictment, III; 2 Hawk. P. C. c. 25, § 67; Rex v. Thompson, 2 Lev. 208; Wade v. S., 71 Ind. 535.

34. Rex v. Burridge, 3 P. Wms. 439, 477.

the means are frequently of a complicated nature, it would lead to great inconvenience[35] and perplexity if they were always to be described upon the record."[36]

§ 9. Charge to be Special—Not as Principal.—The accessory, whether before or after the fact, while he may be joined with the principal,[37] and in the same count,[38] cannot under the common law rules be convicted on an allegation in form as though he were principal;[39] but the charge must be special.[40] Nor will proof that one was principal sustain a charge that he was accessory.[41] Even—

35. See the chapter in Vol. II, commencing at § 493.

36. Co. Ent. 56, 57; Rast. Ent. 48, 51. 52; Sanchar's Case, 9 Co. 114; 2 Hawk. P. C. c. 29, § 17.

37. Ante, § 7; Hartshorn v. S., 29 Ohio St. 635; S. v. Carver, 49 Me. 588, 77 Am. D. 275; Redman v. S., 1 Blackf. 429; Reg. v. Richards, 2 Q. B. D. 311; Reg. v. Fisher, 3 Cox C. C. 68; Keech v. S., 15 Fla. 591; Loyd v. S., 45 Ga. 57.

38. Ante, § 5; Rex v. Hartall, 7 Car. & P. 475; P. v. Valencia, 43 Cal. 552. See Redman v. S., 1 Blackf. 429; Rex v. Austin, 7 Car. & P. 796.

39. New Crim. Law, I, §§ 663 (2), 803 (2); S. v. Allen, 37 La. Ann. 685; Phillips v. S., 26 Tex. Ap. 228, 8 Am. St. 471; P. v. Keefer, 65 Cal. 232, 3 P. 818; Reynolds v. P., 83 Ill. 479, 25 Am. R. 410; Wade v. S., 71 Ind. 535; Walrath v. S., 8 Neb. 80.

40. P. v. Trim, 39 Cal. 75; Reg. v. Fallon, Leigh & C. 217, 9 Cox C. C. 242.

Former jeopardy. There are old authorities holding, at least, that one acquitted as principal cannot afterward be indicted as accessory before the fact. See, for a very full collection of them, and as apparently following them, Rex v. Foy, Vern. & S., 540. But this doctrine is equally repugnant to good sense and to the established law of the present day. S. v. Larkin, 49 N. H. 36, 6 Am. R. 456; Morrow v. S., 14 Lea, 475; Archb. Crim. Pl. & Ev. 19th Ed. 143.

41. Rex v. Gordon, 1 Leach, 515, 519. As to the procedure in Georgia, see Bulloch v. S., 10 Ga. 47, 54 Am. D. 369; McCoy v. S., 52 Ga. 287. In Ohio, Brown v. S., 18 Ohio St. 496; Hartshorn v. S., 29 Ohio St. 635; Noland v. S., 19 Ohio, 131. See also S. v. Smith, 24 Tex. 285; S. v. Rose, 20 La. Ann. 143; U. S. v. Howard, 3 Wash. C. C. 340; S. v. Crank, 2 Bailey, 66, 23 Am. D. 117; S. v. Sims, 2 Bailey, 29; S. v. York, 37 N. H. 175. The conviction of the principal need not be averred, but his guilt must be. Holmes v. C., 25 Pa. 221; Ulmer v. S., 14 Ind. 52. And see P. v. Thrall, 50 Cal. 415; Tully v. C., 11 Bush, 154. See further as to the form, Sampson v. C., 5 Watts & S. 385; Stoops v. C., 7 S. & R. 491, 10 Am. D. 482; S. v. Seran, 4 Dutcher, 519.

§ 10. 1. **Accessory After, under Statutes.**—Though some modern statutes permit the accessory before the fact to be indicted as principal,[42] the accessory after must still be specially charged.[43] And—

2. **Full.**—In all cases the indictment against the accessory must set out a complete offense, as fully as against the principal.[44] Nor should it be left equivocal whether the party is charged as principal or as accessory.[45]

§ 11. **Accessory indicted separately.**—The accessory, if the pleader chooses, may be indicted separately from the principal, either before or after the latter's conviction.[46] If before, the indictment must aver the principal's guilt;[47] if after, it need only allege his conviction, "because the court," says Chitty,[48] "will presume everything on the former occasion to have been rightly and properly transacted."[49] Still it is competent for the defendant to disprove the guilt of the principal; and if he does, he "is entitled to an acquittal."[50]

II. *The Evidence.*

§ 12. **Principal's Guilt—Record.**—In evidence of the guilt of the principal, without which the accessory cannot

42. Ante, § 4; Reg. v. Manning, 2 Car. & K. 887, 1 Den. C. C. 467; Reg. v. Chadwick, 1 Russ. Crimes, 5th Eng. Ed. 176; P. v. Van Bever, 248 Ill. 136, 93 N. E. 725; P. v. Britton, 118 N. Y. S. 989, 134 A. D. 275.

43. Ante, § 2 (4); S. v. Wyckoff, 2 Vroom, 65; Reg. v. Fallon, Leigh & C., 217, 9 Cox C. C. 242; McCoy v. S., 52 Ga. 287; S. v. Larkin, 49 N. H. 39; Reynolds v. P., 83 Ill. 479, 25 Am. R. 410 (overruling dictum in Yoe v. P., 49 Ill. 410); P. v. Trim, 39 Cal. 75; P. v. Gassaway, 28 Cal. 404.

44. P. v. Thrall, 50 Cal. 415; P. v. Crenshaw, 46 Cal. 65; Tully v. C., 11 Bush. 154; Davis v. S. (Tex. 1911), 136 S. W. 45.

45. P. v. Schwartz, 32 Cal. 160. And see Reg. v. Munday, 2 Fost. & F. 170; Rex v. Thompson, 2 Lev. 208, 3 Keb. 674; Reg. v. Butterfield, 1 Cox C. C. 39.

46. New Crim. Law, I, § 667.

47. Ante, § 9, note.

48. 1 Chit. Crim. Law, 273.

49. Morgan v. Luckup, cited 7 T. R. 465; Foster, 365; Com. Dig. Justices, T. 3.

50. McDaniel's Case, Foster, 121, 365; Rex v. Baldwin, 3 Camp. 265; Com. Dig. Justices, T. 3; 4 Bl. Com. 324. See Loyd v. S., 45 Ga. 57; New Crim. Law, I, § 667.

be guilty,[51] the record of his conviction, if it has transpired, is, therefore, admissible and *prima facie* adequate.[52] Nor, where the common law rules prevail, can this record be dispensed with.[53] It appears that the mere verdict will not suffice; but judgment must have been rendered thereon.[54]

§ 13. 1. **No Record.**—Where the principal and accessory are tried together, or the trial of the latter is by statutory permission in advance of the former's, so that there is no record of conviction, but the principal's guilt must be otherwise shown,[55] in general "whatever is evidence against the principal is *prima facie* evidence of the principal felony as against the accessory."[56] Thus,—

2. **Any Conduct**—of the principal, tending to show his own guilt, is evidence thereof equally against the accessory.[57] Again,—

3. **Witness Competent in Part.**—Formerly in North Carolina, negroes could testify against negroes, but not against white men. So when a white man was tried as an accessory to a negro, negro testimony was admissible to the

51. New Crim. Law, I, 666, 667; Leeper v. S., 29 Tex. Ap. 154; Poston v. S., 12 Tex. Ap. 408; Lynes v. S., 36 Miss. 617; S. v. Ross, 29 Mo. 32; Clinton v. Estes, 20 Ark. 216; West v. S., 27 Tex. Ap. 472.

52. New Crim. Law, I, 667 (3), 669; 1 Russ. Crimes, 5th Eng. Ed. 183; Rex v. S., 1 Leach, 288; Rex v. Prosser, 1 Leach, 290, note; C. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. D. 534; Baxter v. P., 2 Gilman, 578; Studstill v. S., 7 Ga. 2; S. v. Crank, 2 Bailey, 66, 23 Am. D. 117; S. v. Sims, 2 Bailey, 29; S. v. Duncan, 6 Ire. 236; Keithler v. S., 10 Sm. & M. 192. And see Anderson v. S., 63 Ga. 675.

53. S. v. Crank, supra.

54. New Crim. Law, I, §§ 667, 668; S. v. Duncan, 6 Ire. 98. See P. v. Gray, 25 Wend. 465.

55. Ogden v. S., 12 Wis. 532, 78 Am. D. 754; P. v. Campbell, 40 Cal. 129; S. v. Jones, 7 Nev. 408; P. v. Outeveras, 48 Cal. 19; P. v. Shepardson, 48 Cal. 189; Buck v. C., 107 Pa. 486. The reader will note some distinctions in these cases, which are apparently not quite alike in doctrine. Figaroa v. S., 58 Tex. Cr. Ap. 611, 127 S. W. 193.

56. Bosanquet, J., in Rex v. Blick, 4 Car. & P. 377; Moody v. S., 27 Tex. Ap. 287. See Brown v. S., 28 Ga. 199; Dunn v. S., 2 Pike, 229, 35 Am. D. 54.

57. S. v. Rand, 33 N. H. 216; S. v. Duncan, 6 Ire. 98. See Reg. v. Hansill, 3 Cox C. C. 597.

guilt of the principal, but not to the white man's participation therein.[58] Also,—

4. **Principal's Confessions.**—It would seem to follow from the foregoing that a confession by the principal would be evidence against the accessory the same as against him. And there is authority to this effect.[59] Yet if the trials are separate, and the principal is in a condition to be called as a witness,[60] there is some ground for looking upon his confessions as mere hearsay; and the current of authority seems to reject them,[61]—a conclusion which would be more satisfactory were it not for the fact that in the general law of evidence, the capacity of one to be a witness is not necessarily adequate cause for excluding evidence of what he said.

§ 14. **Principal in Second Degree.**—The guilt of the principal in the second degree is not dependent on that of the other principal;[62] and against the former, evidence merely to the latter's guilt is not admissible. For example, the record of the conviction of one who struck the fatal blow is not receivable on the trial of a stander-by charged with abetting; it proves no material fact, and only tends to prejudice the jury.[63] So far as the acts of such party are connected with the defendant, and on this ground admissible, they may be made to appear in the ordinary way, without producing the record of conviction.[64]

§ 15. 1. **Witnessing as to Each Other—(Accomplices, &c.)**—The admission of accomplices is explained in the first volume,[65] and how as to joint and separate trials of per-

58. S. v. Chittem, 2 Dev. 49.

59. Rex v. Blick, supra; Smith v. S., 46 Ga. 298; S. v. Ostman, 147 Mo. Ap. 422, 126 S. W. 961; S. v. Warady, 78 N. J. 687, 75 A. 977.

60. Post, § 15.

61. S. v. Newport, 4 Harring. (Del.) 567; Rex v. Turner, 1 Moody, 347; Ogden v. S., supra; Reg. v. Hansill, 3 Cox C. C. 597, 598. See Reg. v. Cox, 1 Fost. & F. 90; Reilley v. S., 14 Ind. 217; Rice v. S., 7 Ind. 332.

62. Ante, § 3.

63. P. v. Bearss, 10 Cal. 68. See Jackson v. S., 54 Ga. 439; Kazer v. S., 5 Ohio, 280.

64. S. v. Crank, 2 Bailey, 66, 23 Am. D. 117. And see Brown v. S., 28 Ga. 199.

65. Vol. II, §§ 1156-1172.

sons variously connected in a common guilt.[66] For example, principal and accessory may be witnesses for and against each other.[67] Thus,—

2. **Larceny and Receiving.**—Where two were indicted for a larceny and a third for receiving the stolen goods, one of the two, having pleaded guilty, was deemed competent against his companion in the theft and the receiver.[68] And—

3. **Accessory and Principal.**—An accessory may even be found guilty on the testimony of the principal alone; the credibility of such witness being for the jury.[69] Of course, where parties connected with one another in this way are jointly indicted, no one is admissible for or against his companions until the case as to him is disposed of;[70] as, for example, accessories before the fact, jointly indicted with the principal, cannot, the case as to them not having proceeded to a conviction or acquittal, give evidence for their principal on his trial.[71] Still,—

4. **Since Husband and Wife**—cannot be witnesses in each other's causes,[72] it has been held that the husband of one charged as accessory cannot testify on behalf of the principal.[73]

66. Vol. II, § 1017 et seq.

67. Nolan v. S., 19 Ohio, 131; C. v. Mullen, 150 Mass. 394, 23 N. E. 51.

68. Reg. v. Hinks, 1 Den. C. C. 84, 2 Car. & K. 462.

69. Keithler v. S., 10 Sm. & M. 192.

70. Vol. II, §§ 1020, 1166.

71. Collier v. S., 20 Ark. 86; Davis v. S., 38 Md. 15, 45, 46.

72. Vol. II, § 1151.

73. S. v. Ludwick, Phillips, N. C. 401. See Vol. II, § 1019 (4, 5).

For Adulterated Milk, selling of, as to both law and procedure, see Stat. Crimes.

Adultery, fornication, and kindred offenses, as to both law and procedure, see Stat. Crimes.

CHAPTER XCVII.

AFFRAY.

Consult—for the law of this offense, New Crim. Law, I, §§ 585, (1), 658 (4), 849 (5); II, §§ 1 et seq., 56, 653-655, 1150. For the form of the indictment, and further explanations, Dir. & F., §§ 924, 925. And look into the indexes for matter in Vol. I. Compare with post, § 992 et seq.

§ 16. 1. **The Allegation and Proof**—must show that persons (1) not less than two in number, (2) fought together by mutual consent or otherwise, (3) in a public place,[74] (4) "to the terror of the people," adds the definition; but such mere constructive terror as is presumable from the fighting in a public place will suffice.[75]

2. **The Number of the Persons Fighting**—need not be directly charged if in any other way it appears that there were two or more.

3. **The Form of the Allegation**—is stated elsewhere.[76] Or, as given in an English book, it is that the defendants, at a time and place named, "being unlawfully assembled together and arrayed in a warlike manner,[77] then and there in a certain public street and highway there situate, unlawfully, and to the great terror and disturbance of divers

74. New Crim. Law, II, §§ 1, 2. And see Ib., I, § 1128; Stat. Crimes, §§ 298, 878; Skains v. S., 21 Ala. 218; Gamble v. S., 113 Ga. 701, 39 S. E. 301; S. v. Warren, 57 Mo. Ap. 502; S. v. Fritz, 133 N. Car. 725, 45 S. E. 957; S. v. Woody, 2 Jones (N. Car.) 335; S. v. Sumner, 5 Strob. (S. Car.) 53; S. v. Hoflin, 8 Humph. (Tenn.) 84; Shelton v. S., 30 Tex. 431; Piper v. S. (Tex. Cr.), 51 S. W. 1118; Reg. v. Hunt, 1 Cox C. C. 177.

75. New Crim. Law, II, §§ 1, 3, 4; S. v. King, 86 N. C. 603; Tompson v. S., 70 Ala. 26; S. v. Brewer, 33 Ark. 17; S. v. Davis, 65 N. Car. 298; S. v. Freeman, 127 N. Car. 544, 37 S. E. 206; S. v. Stanley, 4 Jones (N. Car.) 290; S. v. Peery, 5 Jones (N. Car.) 9, 69 Am. Dec. 768; S. v. Priddy, 4 Humph. (Tenn.) 429; S. v. Heflin, 8 Humph. (Tenn.) 84; Simpson v. S., 5 Yerg. (Tenn.) 356; Pollock v. S., 32 Tex. Cr. 29, 22 S. W. 19.

76. Dir. & F., § 925. And see Ib., § 222.

77. Unnecessary. Dir. & F., § 925; post, § 22.

liege subjects of our lady the queen then and there being, did make an affray."[78] But—

§ 17. **"Make Affray"—"Fight together."**—This form, in omitting to aver that the defendants did "fight together," which would be a statement of fact, and saying instead that they "did make an affray," which is a mere conclusion of law,[79] is, in principle, inadequate. The Tennessee [80] and North Carolina [81] courts have so held; *contra,* the Texas.[82]

§ 18. **These Three Things**—"are necessary to constitute an affray: first, there must be fighting; [82a] second, this fighting must be by or between two or more persons; and third, it must be in some public place [82b] to cause terror to the people. Hence it must follow that if either of these requisites is wanting, an affray does not exist."

§ 19. **Public Place.**—The above form states the place to be "a certain public street and highway;" which is undoubtedly sufficient, because the court can see that it is public. But the mere words "in the town of Clarksville" were adjudged inadequate.[84] Plainly enough the allegation may be either in terms that the place was public,[85] or it may set out facts making it such in law.[86]

§ 20. **"Fighting together."**—Properly the indictment should allege a "fighting together" [87] by the defendants;

78. Archb. Crim. Pl. & Ev. 10th Lond. Ed. 599.

79. Vol. I, §§ 329, 331; Vol. II, §§ 509, 514, 515. Thompson v. S., 70 Ala. 26.

80. Simpson v. S., 5 Yerg. 356; S. v. Priddy, 4 Humph. 429. And see S. v. Vanloan, 8 Ind. 182.

81. Vol. II, § 527 (2).

82. S. v. Washington, 19 Tex. 128, 70 Am. D. 323. And see S. v. Sumner, 5 Strob. 53.

82a. Blackwell v. S., 119 Ga. 314, 46 S. E. 432; S. v. Freeman, 127 N. Car. 544 ?7 S. E. 206.

82b [illegible] e v. S., 113 Ga. 701, 39 S. E. 301; S. v. Fritz, 133 N. C. 725, 45 S. E. 957.

83. Whyte, J., in Simpson v. S., 5 Yerg. 356, 358.

84. S. v. Heflin, 8 Humph. 84.

85. Shelton v. S., 30 Tex. 431; S. v. Warner, 4 Ind. 604; S. v. Griffin, 125 N. C. 692, 34 S. E. 513. But "highway" does not necessarily mean "public place." S. v. Weckly, 29 Ind. 206, see S. v. Dunn, 73 Mo. 586.

86. See, for illustration, post, § 914.

87. Ante, § 16.

and if it omits the word "together," and does not say with whom was the fighting, it would seem to be inadequate.[88] Still,—

§ 21. **"Together" implied.**—It was adjudged sufficient to charge that at a time and place named, the defendants, "being unlawfully assembled together, and arrayed in a warlike manner, then and there, in a public place, unlawfully, and to the great terror and disturbance of all the good citizens of said State then and there assembled, did make an affray by fighting, in contempt," &c.[89]

§ 22. **"Assembled unlawfully"—"Arrayed in Warlike Manner."**—In the defective form above given,[90] the pleader undertakes to supply the lack of good averment by inserting what is useless. To constitute an affray the parties need not be "assembled unlawfully," or "arrayed in a warlike manner;" hence the indictment need not allege that they were. And unless they were in fact, it is practically better to omit this allegation. So that—

§ 23. **A Better Form**—is that on, &c. at, &c., they, in a public way there situate, did make an affray, by then and there fighting together, to the terror of the people then and there lawfully being.[91]

§ 24. 1. **On a Statute,**—enlarging or changing the common law, the indictment must duly conform to the statutory terms as explained in the first volume.[92] To illustrate,—

2. **Affray of Prize-fighting.**—Under a statute making punishable "every person who shall by previous appointment or arrangement meet another person and engage in a fight,"[93] it is plain that these statutory terms must be

88. S. v. Vanloan, 8 Ind. 182. And see S. v. Billingsley, 43 Tex. 93; S. v. Wilson, Phillips, N. C. 237.

89. S. v. Bethal, 5 Humph. 519.

90. Ante, §§ 16 (3), 17.

91. See the cases cited to the preceding sections.

92. Vol. II, §§ 593-642; and see specially, §§ 595-600, 610-612.

93. **Prize-Fighting.** For the law of prize-fights, see New Crim. Law, I, §§ 535, 632 (2), 658 (4); II, § 35 (3); Champer v. S., 14 Ohio St. 437; S. v. Wilson, Phillips (N. C.), 237; Reg. v. Coney, 8 Q. B. D. 534,

covered in allegation. Thereupon it was adjudged sufficient to say that on, etc., at, etc., the defendant "by and in pursuance of a previous appointment and arrangement made to meet and engage in a fight with another person, to wit, with one B, did meet and engage in a fight with the said B." No more specific setting out of the previous appointment, or of the arrangement, or of the defendant's other acts, was deemed necessary.[94] Still, under another statute it has been held not adequate simply to employ the statutory words, that he "engaged in prize-fighting," but facts showing an offense committed by him must be added.[95]

§ 25. **Minor Offenses included—(Assault and Battery).**—In definition, an affray would seem to include, but perhaps not necessarily, an assault and battery.[96] Yet the indictment, in the forms before given, does not charge such assault and battery in any technical way. It may evidently be so drawn as to do this; and if it is, there may be a conviction for assault and battery, or for a simple assault, on the indictment for affray.[97] But if the indictment is otherwise drawn, there cannot be such conviction. Certainly such is the rule in principle.[98] On authority, it is not easy to say how the law is.[99]

15 Cox C. C. 46; post, § 61. And for the offense, more in detail with the form, see Dir. & F. §§ 899-902.

94. C. v. Welsh, 7 Gray, 324. On the trial, the previous arrangement may be inferred from the conduct of the parties and from other circumstances. It need not be proved to have been made within the State, or at a time and place distinct from those of the fight. C. v. Mitchell, 7 Gray, 324.

Leaving the State, etc. For the form upon the statute against leaving the State to engage in a fight, see Dir. & F., § 902; C. v. Barrett, 108 Mass. 302.

95. Sullivan v. S., 67 Miss. 346. Apparently contra, P. v. Taylor, 96 Mich. 576, 56 N. W. 27. And see Reg. v. Orton, 14 Cox C. C. 226; S. v. Stafford, 113 N. C. 635, 18 S. E. 256.

96. New Crim. Law, II, §§ 1, 23, 35 (3).

97. McClellan v. S., 53 Ala. 640; S. v. Brewer, 33 Ark. 176; Childs v. S., 15 Ark. 204.

98. Vol. I, §§ 417-419.

99. That there may be a conviction for assault and battery, see S. v. Allen, 4 Hawks, 356; Cash v. S., 2 Tenn. 198. That there may not be, see C. v. Perdue, 2 Va. Cas. 227.

§ 26. **Both convicted or neither.**—On an indictment against two for affray in assaulting each other, one cannot be convicted of the full charge if the other is acquitted.[1] But in special cases he may be, owing to the form of the indictment or statute.[2]

§ 27. **Relating to the Evidence**—we have a few cases,[3] yet none of a sort requiring special consideration here.

§ 28. **Participants.**—This being a misdemeanor, all who in any way so abet the affray as to become punishable, are principals.[4]

§ 29. **Higher Offense—(Homicide).**—If what the parties meant for an affray results in a higher offense,—as, for example, murder,[5]—practically the indictment will in general be for the higher. And—

§ 30. **Kindred Offense.**—There are various other offenses akin to this, sometimes even called in the books by the same name. When, therefore, an indictment meant for such an offense is inadequate, it is not necessarily bad; it may still charge a common law affray.

Barring Trial for Assault. In North Carolina it was held that one who has been tried in a county court for affray, cannot be again tried for the same act in the Superior Court charged as assault and battery; because, said Battle, J. the charge of an affray "necessarily includes that of the assault and battery for which the second indictment was found." S. v. Stanley, 4 Jones, N. C. 290, 292.

1. Hawkins v. S., 13 Ga. 322, 58 Am. D. 517. But see Cash v. S., 2 Tenn. 198.

2. S. v. Wilson, Phillips, N. C. 237; McClellan v. S., 53 Ala. 640; S. v. Griffin, 125 N. Car. 692, 34 S. E. 513; ante, § 24.

3. Herriott v. S., 1 McMul. 26; Klum v. S., 1 Blackf. 377; Skains v. S., 21 Ala. 218; Hunter v. S., 62 Miss. 540; S. v. Harrell, 107 N. C. 944; S. v. Hamlett, 85 N. C. 520; S. v. Harbison, 94 N. C. 885; S. v. Weaver, 93 N. C. 595. As to the charge to the jury,—see S. v. Harrell, supra.

4. Curlin v. S., 4 Yerg. 143.

5. S. v. Raymond, 11 Nev. 98.

CHAPTER XCVIII.

ARSON AND OTHER LIKE BURNINGS.

Consult—for the law of this title, New Crim. Law, II, § 8 et seq. And for various statutory burnings, see Stat. Crimes, §§ 207, 213, 277, 289, 310, 311. For the precedents and related questions, Dir. & F., §§ 178-199. And for various questions see Vol. I, § 459 (5); Vol. II, §§ 540 (3), 573 (4), 613 (2).

§ 31. **What allege and prove.**—As constituting this offense, it is necessary to allege and prove, (1) a malicious burning[6] of (2) a house,[7] if the indictment is at common law; or if under a statute, some structure the burning of which the statute makes punishable;[8] (3) at common law, belonging to another;[9] or under some of the statutes one's own to the injury of another.[10]

§ 32. 1. **Indictments mainly Statutory.**—Though this is a common law offense, it has been so extended and defined by statutes that nearly all indictments for it are in practice statutory.

2. **How Chapter divided.**—We shall consider, I. The Indictment; II. The Evidence.

6. New Crim. Law, I, §§ 224 (2), 318 (3), 329 (2), 334 (3), 559, 765 (3); II, § 10; Stat. Crimes, § 310. See P. v. Saunders, 13 Cal. Ap. 743, 110 P. 825. Malice is essential, Boone v. S. (Miss. 1903), 33 So. 172; S. v. Hund, 1 Marv. (Del.), 545, 41 A. 192; S. v. Millmeier, 102 Iowa, 692; 72 N. W. 275; S. v. Jones, 106 Mo. 302, 17 S. W. 366; S. v. Morgan, 136 N. Car. 628, 48 S. E. 670.

7. New Crim. Law, I, §§ 318 (3), 329 (2), 559; II, § 8, 11; Stat. Crimes, §§ 207, 213, 277, 289; Com. v. Wyman, 12 Cush. (Mass.), 527.

8. New Crim. Law, II, § 17; C. v. Hayden, 150 Mass. 332.

9. New Crim. Law, I, § 514; II, § 12; S. v. Sarvis, 45 S. C. 668, 24 S. E. 53, 55 Am. St. 806, 32 L. R. A. 647n.

10. Ib. II, § 12.

I. *The Indictment.*

§ 33. **The Forms,**—more fully than here, are given in Directions and Forms.[11] At common law, the charge is that the defendant, on, etc., at, etc., "a certain house of one X, there situate, did feloniously, wilfully, and maliciously set fire to and burn."[12]

§ 34. 1. **"House" or "Dwelling-House."**—The technical and proper word to designate the structure is "house;"[12a] though, as "dwelling-house" is of like meaning but narrower, it appears the substitution of it would not render the indictment bad.[13] If the statute has "dwelling-house," the indictment must employ it, and the word "house," being of broader meaning, will not do.[14] If the arson is of an out-building which is a part of the house, still, at common law, the term in the allegation to designate it should be "house,"[15] and to give the name of the structure—for instance, "barn"—will not suffice, unless the pleader adds that it is parcel of the dwelling-house.[16]

2. **On a statute,**—the indictment must designate the structure by its statutory term, adding other connected or descriptive matter, or not, as the rules for statutory indictments require. The statutes in this respect vary so much in our States that little help can properly be supplied to

11. Dir. & F., §§ 178-199.

12. Matthews Crim. Law, 436; 3 Chit. Crim. Law, 1127; Gibson v. S., 54 Md. 447. See also post, § 35; S. v. Snellgrove, 71 Ark. 101, 71 S. W. 266; Lane v. Com., 134 Ky. 519, 121 S. W. 486; see Lipschitz v. P., 25 Colo. 261, 53 Pac. 1111.

12a. Com. v. Smith, 151 Mass. 491, 24 N. E. 677; Com. v. Elliston, 14 Ky. L. 216.

13. S. v. McCarter, 98 N. C. 637.

14. Stat. Crimes, §§ 277, 289. In an indictment on a statute which had the word "dwelling-house," it was held sufficient to say that the defendant set fire to a house "used as a dwelling-house," being the property of A. B. McLane v. S., 4 Ga. 335, and see Page v. C., 26 Grat. 943. Indictment for arson of "barn or crib." Johnson v. S., 1 Ala. Ap. 151, 55 So. 445.

15. 1 Hawk. P. C. (7th Ed.), c. 39, §§ 1, 2; 3 Inst. 67; Stat. Crimes, §§ 278, 289; post, § 135.

16. S. v. Porter, 90 N. C. 719. Allegation of burning a tenement house is good. S. v. Snellgrove, 71 Ark. 101, 71 S. W. 266.

the reader here beyond a mere reference to cases.[17] If the statute, for example, makes punishable the burning of "any house, barn, or out-house," [18] an indictment upon it may describe the structure by its statutory name of "barn," or "out-house," when it is such, though it remains at common law parcel of the house.[19]

§ 35. **"Feloniously," etc.**—Whether statutory arson is felony or misdemeanor is important in some of the States, where, if it is felony, "feloniously" must be used, though the word is not in the statute.[20] And the pleader should adhere to such statutory terms as are needful according to explanations in another connection,[21] and should otherwise conform to the rules for indictments on statutes;[22] but beyond this, he may employ the common law form. As to both,—

17. C. v. Hamilton, 15 Gray, 480; S. v. Emerson, 53 N. H. 619; McGarry v. P., 2 Lans. 227; P. v. Pierce, 11 Hun, 633; S. v. O'Connell, 26 Ind. 266; P. v. Haynes, 55 Barb. 450, 38 How. Pr. 369; McGary v. P., 45 N. Y. 153; Reg. v. Colley, 2 Moody & R. 475; Whiteside v. S., 4 Coldw. 175; P. v. Giacamella, 71 Cal. 48, 12 P. 302; Smith v. S., 64 Ga. 605; S. v. Thornton, 56 Vt. 35; Wolff v. C., 30 Grat. 833; S. v. Morgan, 98 N. C. 641; Pike v. S., 8 Lea, 577; S. v. Downs, 59 N. H. 320; S. v. Roper, 88 N. C. 656; C. v. Hayden, 150 Mass. 332, 23 N. E. 51; S. v. Bedell, 65 Vt. 541, 27 A. 208; Mulligan v. S., 25 Tex. Ap. 199, 8 Am. St. 435; Cook v. S., 83 Ala. 62, 3 Am. St. 688, 3 So. 849; S. v. Gregory, 33 La. An. 737; S. v. Ambler, 56 Vt. 672; Dougle v. S., 100 Ind. 259; Hall v. S., 3 Lea, 552; Gibson v. S., 54 Md. 447; C. v. Smith, 151 Mass. 491, 24 N. E. 677; Howard v. S., 109 Ga. 137, 34 S. E. 330; S. v. Fontenot, 112 La. 628, 36 So. 630; Banks v. S., 93 Miss. 700, 47 So. 437; Burger v. S., 34 Neb. 397, 51 N. W. 1027; S. v. Grimes, 50 Minn. 123, 52 N. W. 275; P. v. Fairchild, 48 Mich. 31, 11 N. W. 773; S. v. Harvey, 131 Mo. 339, 32 S. W. 1110; Com. v. Uhrig, 167 Mass. 420, 45 N. E. 1047. As to arson of corncrib. Jackson v. S., 144 Ala. 55, 40 So. 979; Thomas v. S., 116 Ala. 462, 22 So. 666; Brown v. S., 52 Ala. 345.

18. Stat. 9 Geo. 1, c. 22.

19. Rex v. North, 2 East, P. C. 1021; Page v. C., 26 Grat. 943; Staeger v. C., 103 Pa. 469; S. v. Snellgrove, 71 Ark. 101, 71 S. W. 266.

20. Vol. II, §§ 533-537; post, § 42. Compare S. v. Barrett, 151 N. C. 665, 65 S. E. 89; S. v. Roper, 88 N. C. 656.

21. Vol. II, §§ 608-622.

22. And see cases cited to the last paragraph.

§ 36. *Allegation of Ownership:—*

1. **Necessity of.**—Since one cannot at common law commit arson of his own house, or under a statute except in circumstances it specifies,[23] the indictment must in some way show that the house was not the defendant's, or that it was his in conjunction with the statutory circumstances.[24] And for other reasons, each particular offense, of whatever sort, should be identified.[25] Both these objects are ordinarily accomplished by an allegation of ownership;[26] so that, whether an indictment for arson is at common law or upon a statute, it alleges the ownership of the structure burned, which, at the trial, must be proved as laid.[27] But there need be no ownership stated where the arson is of a public building.[28] And by late English statutes an averment of ownership is not necessary; or, if made, it need not be proved.[29]

2. **In whom laid.**—Arson being an offense against the security of the habitation, not as impairing the money value of it, the ownership is properly and perhaps in most cases necessarily laid in any person who has the present actual occupancy, or at least the right thereto. It is immaterial whether the fee is in him or not; or, if he is in

23. Ante, § 31 (3).

24. And see Reg. v. Newboult, Law Rep., 1 C. C. 344, 346, 347, 12 Cox, C. C. 148; Mulligan v. S., 25 Tex. Ap. 199, 8 Am. St. 435; S. v. Carter, 49 S. C. 265, 27 S. E. 106.

25. Vol. I, § 325 (2, 6); Vol. II, §§ 506, 507, 566, 568, 677 (1).

26. Vol. II, §§ 571, 581; Stat. Crimes, § 443.

27. Vol. II, § 573; Martin v. S., 28 Ala. 71; S. v. Fish, 3 Dutcher, 323; Rex v. Rickman, 2 East, P. C. 1034; Martha v. S., 26 Ala. 72; P. v. Myers, 20 Cal. 76; C. v. Wade, 17 Pick. 395; Carter v. S., 20 Wis. 647; Boles v. S., 46 Ala. 204; McGary v. P., 45 N. Y. 153; Graham v. S., 40 Ala. 659; S. v. Keena, 63 Conn. 329, 28 A. 522; Smoke v. S., 87 Ala. 143, 6 So. 376; Kruger v. S., 135 Ind. 573, 35 N. E. 1019. See S. v. Kroscher, 24 Wis. 64.

Not his own. "Did, etc. willfully burn a certain prairie, the said prairie not being his own," was held good. S. v. White, 41 Tex. 64; P. v. Davis, 135 Cal. 162, 67 P. 59.

28. Dir. & F., § 183; Mott v. S., 29 Ark. 147; S. v. Roe, 12 Vt. 93; S. v. Johnson, 93 Mo. 73. And see Stevens v. C., 4 Leigh, 683. As to a jail, S. v. Whitmore, 147 Mo. 78, 47 S. W. 1068, laying ownership in sheriff who had charge.

29. Reg. v. Newboult, supra.

actual possession, whether another has a better right to it than he, or not.[30] Even—

§ 37. 1. **A Wrongful Occupancy**,—by one in his own right, will support the allegation of ownership.[31] But—

2. **A Servant's Occupancy**—is the master's, in whom therefore the ownership is to be laid.[32] Moreover,—

30. New Crim. Law, II, §§ 12, 13; S. v. Toole, 29 Conn. 342, 76 Am. D. 609; S. v. Gailor, 71 N. C. 88, 17 Am. R. 3; P. v. Wooley, 44 Cal. 494; S. v. Moore, 61 Mo. 276; Woodford v. P., 62 N. Y. 117, 126, 20 Am. R. 464; Tuller v. S., 8 Tex. Ap. 501; Levy v. P., 80 N. Y. 327; S. v. Hannett, 54 Vt. 83; P. v. Eaton, 59 Mich. 559, 100 N. W. 208; Adams v. S., 62 Ala. 177; P. v. Fairchild, 48 Mich. 31; S. v. Bradley, 1 Houst. Crim. 164. And see S. v. Lyon, 12 Conn. 487; post, §§ 137, 138; P. v. Davis, 135 Cal. 162, 67 Pac. 59; Lipschitz v. P., 25 Colo. 261, 53 Pac. 1111; Com. v. Napier, 27 Ky. L. 131, 84 S. W. 536; S. v. Hunt, 190 Mo. 353, 88 S. W. 719; S. v. Carter, 49 S. C. 265, 27 S. E. 106; Kelley v. S., 44 Tex. Cr. Ap. 187, 70 S. W. 20; Dunlap v. S., 50 Tex. Cr. Ap. 504, 98 S. W. 845.

31. Rex v. Wallis, 1 Moody, 344; 2 Russ. Crimes (5th Eng. Ed.) 920; post, § 138.

32. Rickman's Case, 2 East, P. C. 1034. East says: "It requires great nicety in some cases to distinguish the person who may be said to occupy suo jure, and against whom the offense must be laid to have been committed. In Glandfield's Case, it appeared that the out-houses burned were the property of Blanche Silk, widow, but were only made use of by John Silk, her son, who lived with her, after his father's death, in the dwelling-house adjoining the out-houses, and took upon him the sole management of the farm, with which these out-houses were used, to the loss and profit of which he alone stood, though without any particular agreement between him and his mother; and he paid all the servants, and purchased all the stock; but the legal property both in the dwelling-house and farm was in the mother, and she alone repaired the dwelling-house and the out-houses in question. Health, J., held that as to the stable, pound, and hogsties which the son alone used, the indictment must lay them to be in his occupation; and as to the brew-house (another of the out-houses burned), the mother and son both occasionally paying for ingredients, the beer being used in the family, to the expenses of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid in their joint occupation. The prisoner was afterwards convicted on a second indictment (which contained two counts, the first laying the occupation in the son alone, the other laying it in the mother and son), drawn agreeably to this opinion; the first having improperly laid the whole premises as in the sole occupation of the mother; and he was ex-

3. **Ownership is Presumed,**—in matter of evidence, from occupancy.[33] Again,—

4. **Other Reasons**—may govern a different case; as, where a statute makes punishable the burning of a structure not used for dwelling, so that the offense is not against the habitation, there is no objection to laying the ownership in one in whom is the fee, though it is under lease to a tenant in possession.[34]

§ 38. **Separate Families,**—occupying each its particular rooms in a house, create distinctions as to ownership explained elsewhere.[35] If the tenements are distinct, con-

ecuted." 2 East, P. C. 1034, 1035. See also S. v. Fish, 3 Dutcher, 323; Davis v. S., 52 Ala. 357; Harvey v. S., 67 Ga. 639; S. v. Haynes, 66 Me. 307, 22 Am. R. 569; post § 138.

33. S. v. Taylor, 45 Me. 322; S. v. Jaynes, 78 N. C. 504; S. v. Burrows, 1 Houst. Crim. 74; Hannigan v. S., 131 Ala. 29, 31 So. 89; P. v. Davis, 135 Cal. 162, 67 P. 59; Morgan v. S., 120 Ga. 499, 48 S. E. 238. Proof of locality by street and number, or by being near to well-known land marks is sufficient. If one is indicted for arson of his own house, ownership must be strictly proved; otherwise not. P. v. Handley, 100 Cal. 370, 34 P. 853; P. v. Laverty, 9 Cal. Ap. 756, 100 P. 899; Heard v. S., 116 Tenn. 713, 94 S. W. 605; Goldsmith v. S., 46 Tex. Cr. 556, 81 S. W. 710. Ownership may be proved by a certified copy of a deed, Com. v. Preece, 140 Mass. 276, 278, 5 N. E. 494, or by any proof competent in a civil action, as a receipt for rent. S. v. Watson, 47 Ore. 543, 85 P. 336. An allegation of ownership by a trustee in bankruptcy may be proved by a copy of the proceedings certified by the referee. Morgan v. S., 120 Ga. 499, 48 S. E. 238; Harrell v. S., 121 Ga. 207, 49 S. E. 703.

34. P. v. Fisher, 51 Cal. 319. And see P. v. Simpson, 50 Cal. 304; S. v. Moore, 61 Mo. 276; P. v. Shainwold, 51 Cal. 468; Johnson v. S., 1 Ala. Ap. 148, 55 So. 268. As to variance in proving ownership see Smoke v. S., 87 Ala. 143, 6 So. 676; P. v. Winson, 113 Cal. 403, 45 P. 708, 54 Am. St. 357, 33 L. R. A. 374; Kruger v. S., 135 Ind. 573, 35 N. E. 1019; Burger v. S., 34 Neb. 397, 51 N. W. 1027.

35. Stat. Crimes, §§ 277-289, particularly § 286. A house a man occupies in part for his dwelling, letting the rest to lodgers, is all properly described as his. And it is not otherwise though he has made an assignment in bankruptcy, if the assignee has not taken possession. Rex v. Ball, 1 Moody, 30. A room separately leased to a merchant for a store, having no communication with the other parts of the building, is well laid as the lessee's. S. v. Sandy, 3 Ire. 570. A building occupied partly by a ten-

stituting separate houses, the ownership should be laid in him whose tenement is burned. To lay it in all collectively implies a joint occupancy, contrary to the fact to be proved.[36] And an indictment charging that the defendant did "in a certain store of one H" set fire, etc., is not sustained by proof of setting fire in the same building, but in a different room from the one occupied as a store by H.[37]

§ 39. **Form of Alleging Ownership.**[38]—The burning may be charged to be of the house of A,[39] or belonging to one A,[40] or occupied by A as a residence,[41] or in the possession of A,[42] or the property of A.[43] That it "was then and there the property of one L, and was then and there the dwelling-house of one C," was adjudged insufficient; because of the uncertainty whether it was C's or L's. Neither could the defect be cured by any rejecting of surplusage.[44]

§ 40. *Human Being in House:—*

1. **Fact—Name.**—The indictment on a statute making it an aggravated offense to set fire to a house wherein is a human being must state that there was in the house such being, yet not necessarily his name.[45] And—

ant who usually lodged there and in part by the owner, was held to be rightly described as the dwelling-house of the tenant. Shepherd v. P., 19 N. Y. 537. See post, § 138.

36. S. v. Toole, 29 Conn. 342, 76 Am. D. 602.

37. S. v. Tennery, 9 Iowa, 436. And see P. v. Fairchild, 48 Mich. 31.

38. See post, § 139.

39. Wolf v. S., 53 Ind. 30; Rex v. Donnavan, 1 Leach, 69; Hannigan v. S., 131 Ala. 29; Jordon v. S., 142 Ind. 422, 41 N. E. 817.

40. C. v. Hamilton, 15 Gray, 480; Woodford v. P., 62 N. Y. 117, 125, 126, 20 Am. R. 464.

41. Young v. C., 12 Bush, 243. And see Tuller v. S., 8 Tex. Ap. 501.

42. Rex v. Wallis, 1 Moody, 344; Kelley v. S., 44 Tex. Cr. 187, 70 S. W. 20; S. v. Daniel, 121 N. C. 574, 28 S. E. 855.

43. Woodford v. P., supra, p. 126; Goff v. S., 60 Fla. 13, 17, 53 So. 327; S. v. Daniel, 121 N. C. 574, 28 S. E. 255 "in possession of" not necessary.

44. P. v. Myers, 20 Cal. 76. As to occupation by lessee. S. v. Graham, 121 N. C. 623, 28 S. E. 409; S. v. Barrett, 2 Penn. (Del.) 297, 47 A. 381; Gutgesell v. S. (Tex. Cr. Ap. 1898), 43 S. W. 101.

45. S. v. Aguila, 14 Mo. 130; Woodford v. P., 62 N. Y. 117, 20 Am. R. 464; Beaumont v. S., 1 Tex. Ap. 533, 28 Am. R. 424. See Reg. v. Fletcher, 2 Car. & K. 215;

2. **The Full Statutory Terms,**—describing the offense, must be reproduced.[46]

§ **41.** *Allegation of Place:*—

"**There situate.**"—The words "there situate," commonly employed in addition to the ordinary allegation of venue,[47] do not seem necessary in principle, or on the English[48] or American[49] authorities.

§ **42.** *Allegation of Intent:*—

1. "**Feloniously,**"—in most of the States, if the offense is felony as it is at the common law, must occur in the indictment.[50] Also,—

2. "**Wilfully,**" "**Maliciously.**"—"The burning," says Archbold, "must be done wilfully and maliciously, in order to be an offense either at common law or within Stat. 7 Will. 4 & 1 Vict. c. 89."[51] But he adds: "If the act be proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved. The absence of malice or spite to the owner is no answer to the charge."[52] Moreover,—

Reg. v. Paice, 1 Car. & K. 73; Lacy v. S., 15 Wis. 13; Dick v. S., 53 Miss. 384; Dir. & F., § 188; S. v. Jones, 171 Mo. 401, 404, 71 S. W. 680, 94 Am. St. 786; Page v. Com., 26 Gratt (Va.), 943; Childress v. S., 86 Ala. 77, 5 So. 775.

46. Lewis v. S., 49 Miss. 354. And see Page v. C., 26 Grat. 943; Woodford v. P., supra.

47. Ante, § 33. See post, § 135.

48. Rex v. Napper, 1 Moody, 44.

49. Dir. & F., § 179, note; C. v. Lamb, 1 Gray, 493; S. v. Gwinn, 24 S. C. 146; S. v. Moore, 24 S. C. 150, 58 Am. R. 241. See C. v. Barney, 10 Cush. 480; S. v. Price, 6 Halst. 203; S. v. Gaffrey, 4 Chand. 163, 165; S. v. White, 41 Tex. 64; S. v. Wacker, 16 Mo. Ap. 417.

50. Vol. II, §§ 534-537; ante, §§ 33, 35; Kellenbeck v. S., 10 Md. 431, 69 Am. D. 166. See S. v. Keen, 95 N. C. 646; Mott v. S., 29 Ark. 147.

51. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 314; S. v. Hand, 1 Maw. (Del.) 545, 41 Atl. 192; S. v. Harvey, 130 Iowa, 394, 106 N. W. 938; Boone v. S. (Miss. 1903), 33 So. 172.

52. Ib. Referring to Rex v. Salmon, Russ. & Ry. 26; S. v. Ross, 77 Kan. 341, 94 P. 270. "Malicious" is not necessary under Missouri statute. S. v. McCoy, 162 Mo. 383, 62 S. W. 991. "Wantonly and wilfully" under statute. S. v. Pierce, 123 N. C. 745, 31 S. E. 847; P. v. Haynes, 38 How. Pr. 369.

§ 43. 1. **Further.**—One can hardly be certain whether or not both "wilfully" and "maliciously" are indispensable at the common law. Practically the pleader in caution will insert both. Most of the statutes have both, conjunctivey connected; then probably both must be inserted in the indictment to avoid a variance. Yet "maliciously," in the indictment, has been adjudged an equivalent for "wilfully" in the statute.[53] On the other hand, "maliciously" is of somewhat larger meaning than "wilfully," which, in an indictment, would not, therefore, supply the place, it is presumed, of "maliciously" in the statute.[54] And—

2. **"Voluntarily."**—The words of a statute being "feloniously, unlawfully, and maliciously," and of the indictment, "feloniously, voluntarily, and maliciously," the variance was held to be fatal.[55]

§ 44. **"Maliciously" not in Statute.**—Malice being an ingredient in common law arson, it has been deemed to be such even in arson under a statute which does not contain the term or its equivalent; so that the statutory indictment must charge the act to have been done maliciously. Thus, under the words "shall be guilty of burning any dwelling-house, store, cotton-house, gin, or out-house, barn, or stable, or shall be accessory thereto," an indictment fully within them yet containing no averment of malice was held to be bad.[56]

53. Chapman v. C., 5 Wheat. 427, 34 Am. D. 565; P. v. Haynes, 55 Barb. 450, 38 How. Pr. 369.

54. Vol. II, § 612 and notes, 613.

55. Rex v. Reader, 4 Car. & P. 245; Rex v. Turner, 1 Moody, 239.

56. Jesse v. S., 28 Miss. 100. Maxwell v. S., 68 Miss. 339, 8 So. 546; see, S. v. Harvey, 130 Iowa, 394, 106 N. W. 938; as to malice under statute. The rule of pleading, under which this decision proceeded, was stated by Handy, J., as follows: "If the words used in the statute do not, in view of the nature of the offense and the recognized principles of law, describe the offense so as to convey to the mind a full and clear idea of everything necessary to constitute the crime, in such case the full measure of the offense must be charged by the use of such words as are necessary and proper, under established rules of law, to characterize it. The difference is simply that between offenses which are fully and clearly defined in the statute,

§ 45. 1. **Follow Statute.**—As to the intent, equally with the rest, the indictment on a statute must follow its language.[57] And—

2. **To Injure.**—To fill the terms of some of the statutes, it must be added that the intent was to injure some person,[58]—not necessarily the one in possession of the structure.[59] Thus,—

§ 45 a. **To Defraud Insurers**—is a common form of the statutory intent;[60] in which case, it must be laid in the indictment, and proved as laid.[61]

§ 46. *Allegation of the Burning*:—

At Common Law—"Set Fire to"—"Burn."—The meaning of these terms is elsewhere stated.[62] The ordinary common law indictment has both.[63] Chitty's form is that

and such as are described generally. In the former, the description contained in the statute is sufficient; in the latter, the offense must be charged agreeably to the rules of the common law." Pp. 109, 110. See Vol. II, § 623 et seq. As to the point of the text, see also Rex v. Minton, 2 East, P. C. 1021; Kellenbeck v. S., 10 Md. 431, 69 Am. D. 166; Reg. v. Lyons, Bell, C. C. 38, 45. And see S. v. England, 78 N. C. 552. Maliciously not necessary in indictment. State v. McCoy, 126 Mo. 683, 62 S. W. 991. But it is safe to say that under most of the statutes willfullness and malice or a malicious intent must be alleged and proved.

57. Dir. & F., § 180; C. v. Squire, 1 Met. 258; Chapman v. C., 5 Whart. 427, 34 Am. D. 565; S. v. Hill, 55 Me. 365.

58. Ante, § 36; Reg. v. Paice, 1 Car. & K. 73; Rex v. Newill, 1 Moody, 458; Rex v. Smith, 4 Car. & P. 569; see Goff v. S., 60 Fla. 13, 17, 53 So. 327. But in S. v. Snellgrove, 71 Ark. 101, 71 S. W. 266, such an allegation was held surplusage; see P. v. Fanshawe, 137 N. Y. 68, 32 N. E. 1102.

59. Rex v. Wallis, 1 Moody, 344; Reg. v. Lyons, Bell, C. C. 38.

60. New Crim. Law, II § 12; Reg. v. Lyons, Bell, C. C. 38.

61. Dir. & F., §§ 184-187; Staaden v. P., 82 Ill. 432, 25 Am. R. 333; Evans v. S., 24 Ohio St. 458; P. v. Hughes, 29 Cal. 257; P. v. Schwartz, 32 Cal. 160; Reg. v. Kitson, Dears. 187, 188; S. v. England, 78 N. C. 522; S. v. Porter, 90 N. C. 719; see Reg. v. Newboult, Law Rep. 1 C. C. 344; C. v. Goldstein, 114 Mass. 272; Baker v. S., 25 Tex. Ap. 1, 8 Am. St. 427; compare as to allegations, Goff v. S., 65 Fla. 13, 17, 53 So. 327; Parb v. S., 143 Wis. 561, 128 N. W. 65; intent to defraud or injure not required in absence of a statute. S. v. McCarter, 4 S. E. 553, 98 N. C. 637.

62. Stat. Crimes, §§ 310, 311; S. v. Dennin, 32 Vt. 158, 163.

63. Ante, § 33.

the defendant "feloniously, etc., did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, wilfully, and maliciously did burn and consume."[64] But the common law definitions has only "burn;" and it is not easy to see that to expand the allegation beyond it, by "set fire to," can make better what otherwise is abundantly good. We shall assume, therefore, that "burn," alone is adequate at the common law. But—

§ 47. **Some of the Statutes**—have "set fire to," others "burn;" and whichever is the statutory term, it ought properly, and perhaps necessarily, to be in the indictment.[65] Both are not essential.[66] Or, if the statute is in the alternative, "set fire to *or* burn," either will suffice.[67] Still, in Maine, where the statute had "burn," "set fire to" was held to be a permissible equivalent;[68] while in Virginia,[69] Arkansas,[70] and North Carolina,[71] the contrary was with perhaps a nicer accuracy adjudged. Even if we accept the Maine doctrine, it will not necessarily follow that "burn," in the indictment, can take the place of "set fire to" in the statute.[72]

§ 48. *Further of the Indictment:*—

Value.—If the punishment to be inflicted is greater or less according to the value of the property, the value must be stated in the indictment;[73] because every indictment,

64. 3 Chit. Crim. Law, 1127. "Set fire to" in an indictment is equivalent to burn. Benbow v. S., 128 Ala. 1, 29 So. 553; Graham v. S., 40 Ala. 659, 664; S. v. Hull, 83 Iowa, 112, 48 N. E. 917.

65. Vol. II, § 613 (2); Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 314; Howel v. C., 5 Grat. 664; Hester v. S., 17 Ga. 130; Cochrane v. S., 6 Md. 400; S. v. Brand, 77 N. J. 486, 72 A. 131. Intent to burn and consume need not be pleaded. S. v. McCoy, 162 Mo. 383, 62 S. W. 991.

66. Rex v. Salmon, Russ. & Ry. 26; Rex v. Stallion, 1 Moody, 398; P. v. Myers, 20 Cal. 76.

67. Polsten v. S., 14 Mo. 463; P. v. Fairchild, 48 Mich. 31, 11 N. W. 773; P. v. Myers, 20 Cal. 76, 78.

68. S. v. Taylor, 45 Me. 322.

69. Vol. II, § 613 (2); Howel v. Com., 5 Grat. (Va.) 664, 670.

70. Mary v. S., 24 Ark. 44, 81 Am. D. 60.

71. S. v. Hall, 93 N. C. 571.

72. Stat. Crimes, § 311. As to proof of "burning." S. v. Dinneen, 7 Pen. (Del.) 505, 76 Atl. 623.

73. Vol. II, §§ 540, 566, 567.

for whatever offense, must set out every fact which the law makes an element in the punishment.[74] But where the value is not such a circumstance, it need not be alleged.[75]

§ 48 a. Degrees.—In some of the States, the statutes divide arson into degrees, distinguished by specified circumstances, and differing in their punishments. Thereupon the indictment must state the circumstances, within the rule of the last section. Yet sometimes, consistently with this rule, the terms of the statute and of the indictment will permit a verdict for one or another degree according to the facts proved.[76]

§ 48 b. One Offense or more—(Defraud Insurers).—Where the burning is to defraud insurers, it is one offense only though different insurers have separate policies on the property.[77] And where the offender sets fire to one house to burn it, but by its communicating more are consumed, he may be charged for the whole in one count as one offense.[78]

74. Vol. I, § 77 et seq.

75. C. v. Hamilton, 15 Gray, 480, 482; Brown v. S., 52 Ala. 345; Ayres v. S., 115 Tenn. 722, 91 S. W. 195; Wolf v. Com., 30 Grat. (Va.) 833.

76. Brown v. S., 52 Ala. 345; Didieu v. P., 4 Par. Cr. (N. Y.) 593; Woodford v. P., 62 N. Y. 117, 20 Am. R. 464; Dedieu v. P., 22 N. Y. 178. And see Sands v. S., 80 Ala. 201; Cook v. S., 83 Ala. 62, 3 Am. St. 688. As to the form of the verdict see Davis v. S., 52 Ala. 357; P. v. Coch, 53 Cal. 627; P. v. Baza, 53 Cal. 690. The degree need not be alleged if the facts are. P. v. Russell, 81 Cal. 616, 23 P. 318; S. v. Young, 9 N. D. 165, 82 N. W. 420, arson in third degree. James v. S., 104 Ala. 20, 16 So. 94.

77. C. v. Goldstein, 114 Mass. 272.

The corporate existence—of the insurance company, or whether it was a domestic or foreign one, need not be averred or specifically proved. Johnson v. S., 65 Ind. 204. And see Dir. & F., § 79 and note; Vol. II, § 682. Contra, P. v. Schwartz, 32 Cal. 160; Stooden v. P., 82 Ill. 432, 25 Am. 333. The intent must be alleged specifically and so proved. Mai v. P., 224 Ill. 414, 79 N. E. 633.

78. Woodford v. P., 62 N. Y. 117, 20 Am. R. 464.

Joinder. As to the joinder of counts and offenses in arson, see also Miller v. S., 45 Ala. 24; Mitchell v. S., 5 Coldw. 53; C. v. Cain, 102 Mass. 487. Allegation of burning several buildings at one time is sustained by proof of one or more. P. v. Stewart, 163 Mich. 1, 17 Det. Leg. N. 775, 127 N. W. 816.

§ 49. **In Attempts**—to burn, the indictment need not describe the combustible materials employed.[79]

II. *The Evidence.*

§ 50. 1. **Intent.**—At common law, this offense not requiring a specific intent,[80] no other than that implied by the words "feloniously, wilfully, and maliciously," or their accepted equivalents, need be either averred or proved.[81] Under some of the statutes there must be a showing of a particular intent which they severally specify,[82] to the satisfaction of the jury.[83] Thus,—

2. **Defraud Person.**—If the statutory charge is that the burning was to defraud a particular person, it "must," says Archbold,[84] "be proved as laid." Still, within the rule that one is presumed to intend the natural and probable consequences of his act, the proof of a wilful burning sufficiently establishes that it was with the intent to injure the owner or occupier of the structure burned.[85] Yet—

79. C. v. Flynn, 3 Cush. 529. Instigations of others to set fire by an offer of a bribe or by furnishing them with the means is an attempt. Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55; S. v. Taylor, 47 Ore. 450, 4 L. R. A. (N. S.) 417, 84 P. 82.

80. New Crim. Law, II, § 14 (1).

81. Dir. & F., § 179; S. v. Jones, 106 Mo. 302, 17 S. W. 366.

82. Ib., § 180; Staaden v. P., 82 Ill. 432, 25 Am. 333.

83. S. v. Phifer, 90 N. C. 721; S. v. Lockwood (Del. Gen. Sess. 1909), 74 A. 2. It must be proved beyond reasonable doubt that the burning was not accidental. Winslow v. S., 76 Ala. 42; Jesse v. S., 28 Miss. 100, 109; Thomas v. S., 41 Tex. 27; Com. v. Phillips, 12 Ky. L. 410, 14 S. W. 378; Jenkins v. S., 53 Ga. 33; Brown v. Com., 87 Va. 215, 12 S. E. 472; Williams v. S., 125 Ga. 741, 54 S. E. 661; S. v. Pienick, 46 Wash. 523, 90 P. 645, 11 L. R. A. (N. S.) 987; Ragland v. S., 2 Ga. Ap. 492, 58 S. E. 689. The presumption is that it was accidental if nothing appears to the contrary. Williams v. S., 125 Ga. 741, 54 S. E. 661; Ragland v. S., 2 Ga. Ap. 492, 8 S. E. 689; West v. S., 6 Ga. Ap. 105, 64 S. E. 130.

84. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 316, 317.

85. Rex v. Farrington, Russ. & Ry. 207. And see Reg. v. Davies, 1 Fost. & F. 69; Reg. v. Heseltine, 12 Cox, C. C. 404, 5 Eng. Rep. 483; Vol. II, § 1100. Information need not allege insurers were authorized to do business in the State. Parb. v. S., 143 Wis. 561, 128 N. W. 65.

3. **Intent to defraud Insurers.**—Where the defendant is owner, and the allegation is that the burning was to defraud insurers, the presumptions are balanced; and, says Archbold, "the intent to defraud cannot be inferred from the act itself, but must be proved by other evidence." The insurance policy must be produced,[86] and the jury must be satisfied that he knew of its existence; such knowledge being a necessary ingredient in the intent to injure.[87] Evidence that the insurance was for more than the worth of the building is pertinent;[88] also, that the defendant attempted to procure payment of what was thus excessive.[89]

4. **The Means**—by which the burning was effected are immaterial; as, where the charge was the setting of fire to some woods, proof that it was set to a summer-house there-

86. Rex v. Gilson, Russ. & Ry. 138; Rex v. Doran, 1 Esp. 127; P. v. Vasalo, 120 Cal. 168, 52 P. 305; Meister v. P., 31 Mich. 99. And may be read without proof of the corporate existence of the company. Johnson v. S., 65 Ind. 204. Contra, as to producing policy when accused is not owner. P. v. Goldberg, 130 N. Y. S. 768.

87. Martin v. S., 28 Ala. 71.

88. Shepherd v. P., 19 N. Y. 537; S. v. Cohn, 9 Nev. 179; C. v. Hudson, 97 Mass. 565; S. v. Watson, 63 Me. 128; C. v. McCarthy, 119 Mass. 354; Hinkle v. S., 174 Ind. 276, 91 N. E. 1090; Hooker v. S., 98 Md. 145, 56 Atl. 390; P. v. Kelly, 153 N. Y. 631, 47 N. E. 1110; dismissing appeal. 11 A. D. 495, 42 N. Y. S. 756.

89. P. v. Trim, 39 Cal. 75; Reg. v. Gray, 4 Fost. & F., 1102; Stitz v. S., 104 Ind. 359, 4 N. E. 145. And see P. v. Levine, 85 Cal. 39, 44, 22 P. 969, 24 P. 631; C. v. Makely, 131 Mass. 421; P. v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846; reversing 20 A. D. 139, 46 N. Y. S. 1020, 12 N. Y. Cr. 524. Where the accused is charged with arson to secure insurance money the amount of the loss, v. Sevine (Cal.), 22 P. 969; the value of the property, S. v. Ward, 61 Vt. 153, 17 A. 483; S. v. Harvey, 130 Iowa, 393, 106 N. W. 938, and the acceptance by him of a less amount than claimed. S. v. Bland, 77 N. J. L. 486, 72 A. 131, may be proved. The written proof of loss, sworn to and signed by the accused, is admissible. P. v. Mix, 149 Mich. 260, 112 N. W. 907. The contents and execution of the insurance policy must be proved by parol if accused does not produce it. Knights v. S., 58 Neb. 225, 78 N. W. 508, 76 Am. St. 78n. It may be shown also that the accused forbade the removal of property from his house. Bluman v. S., 33 Tex. Cr. 43, 21 S. W. 1027, 26 S. W. 75, during the fire or that on the other hand he took property from the house before the fire. S. v. Mann, 39 Wash. 144, 81 P. 561.

in, whence it communicated, was sufficient.[90] So the proof may be that the fire was set in a room other than the one occupied by the person named in the indictment, whence it burned through to the latter.[91]

5. **As to Husband and Wife.**—"The intention must be to injure some person who is not identified with the defendant. Therefore a married woman cannot be indicted for setting fire to the house of her husband, with intent to injure him."[92]

§ 51. **In Attempts,**—there must be proof that arson was specifically intended,[93] and that the alleged act toward it was done. If the charge is of an attempt to set fire to one building by attempting the same to another, proof of what was done in the latter is pertinent, but its effect is for the jury.[94]

§ 52. 1. **View—Burned Part.**—In a suitable case, the jury may have a view[95] of the premises burned.[96] Also a board from the burned building may be produced in court.[97] And—

2. **What for Jury.**—Whether such board had been so affected by fire as to constitute a burning is a question of fact for the jury, under instructions upon the law by the court, as in ordinary cases.[98] Also, whether or not the building was a "house," "barn," or the like, is a mixed

90. Reg. v. Price, 9 Car. & P. 729. An allegation of burning a dwelling-house must be substantially proved. Com. v. Hayden, 150 Mass. 332, 333, 23 N. E. 51; P. v. Handley, 93 Mich. 46, 48, 52 N. W. 1032.

91. Levy v. P., 19 Hun, 383.

92. Rex v. March, 1 Moody, 182.

93. New Crim. Law, I, §§ 728, 729.

94. C. v. Harney, 10 Met. 422. See C. v. Tucker, 110 Mass. 403; Pipe v. S., 3 Tex. Ap. 56.

95. Vol. II, § 965 (3).

96. Fleming v. S., 11 Ind. 234.

97. C. v. Betton, 5 Cush. 427. See Vol. II, § 965 (1).

98. C. v. Betton, supra; S. v. Williamson, 42 Conn. 261. At common law an actual burning of a part of the premises must be proved. It need not be shown that a blaze was seen, but there must be a reduction of wood to charcoal and a substantial change in its identity. S. v. Hall, 93 N. C. 571; Woolsey v. S., 30 Tex. Ap. 346, 17 S. W. 546.

question of law and fact, to be thus decided by the jury under instructions from the court.[99]

§ 53. 1. **For the Common Evidence**—against the defendant, such as is admissible in all criminal trials, there is a wide scope in arson. Thus,—

2. **Confessions**—of the prisoner are receivable in arson the same as in other offenses,[1] and with the like limitations.[2] So,—

3. **Threats**—may be shown.[3]

4. **Solicitation**—of another to burn the building, is relevant.[4]

5. **Motive.**—Anything which evinces a hostile feeling, or any other motive to the crime, may be shown.[5]

99. S. v. McGowan, 20 Conn. 245, 52 Am. D. 336; S. v. Smith, 28 Iowa, 565; McGarry v. P., 2 Lans. 227; Van Immons v. S., 29 Ohio Cir. Ct. 681; U. S. v. Carrish, 145 Fed. 242.

1. C. v. Ingraham, 7 Gray, 46; Reg. v. Sleeman, Dears. 249, 6 Cox, C. C. 245, 22 Eng. L. & Eq. 606; Rex v. Long, 6 Car. & P. 179; Reg. v. Hearn, Car. & M. 109; Reg. v. Taylor, 8 Car. & P. 733. As to confessions in general, see Vol. I, § 126a et seq.

2. Nesbit v. S., 43 Ga. 238; Murray v. S., 43 Ga. 256; Fulton v. S., 58 Ga. 224; Hannigan v. S., 131 Ala. 29, 31 So. 89; Com. v. Wesley, 166 Mass. 248, 44 N. E. 228.

3. Vol. II, § 1110; C. v. Goodwin, 14 Gray, 55; Com. v. Crowe, 165 Mass. 139, 42 N. E. 563; C. v. Chase, 147 Mass. 597, 18 N. E. 565; S. v. Parks, 109 N. C. 813, 13 S. E. 939; C. v. Quinn, 150 Mass. 401, 23 N. E. 54; Kinchlen v. S., 50 Fla. 102, 39 So. 467; Howard v. S., 109 Ga. 137, 34 S. E. 330; S. v. Millmeier, 102 Iowa, 692, 72 N. W. 275; P. v. Eaton, 59 Mich. 559, 561, 26 N. W. 702; S. v. Ledford, 133 N. C. 714, 45 S. E. 944; S. v. Lytle, 117 N. C. 799, 23 S. E. 476; Prater v. S., 107 Ala. 26, 18 So. 238; Morgan v. S., 120 Ga. 499, 48 S. E. 238. Threats against members of the owner's family not residing in the building, Johnson v. S., 89 Ga. 107, 14 S. E. 889; Clinton v. S., 58 Fla. 23, 50 So. 580, against neighbors near the house burned, Bond v. Com., 83 Va. 581, 3 S. E. 149, or against a person who, though not the owner, has goods stored in the building, S. v. Emery, 59 Vt. 84, 7 A. 29, have been received. A threat to burn a particular building is not excluded by a subsequent change in ownership. S. v. Fenlason, 78 Me. 495, 7 A. 385; Com. v. Crowe, 165 Mass. 139, 42 N. E. 563. Not enough for prima facie case. S. v. Freeman, 131 N. C. 125, 42 S. E. 575.

4. Martin v. S., 28 Ala. 71.

5. S. v. Moffitt, 31 Iowa, 316; Bell v. S., 74 Ala. 420; Ford v. S.,

6. **Foot-prints,**—when relevant, are admissible.[6]

7. **Circumstantial.**—The evidence is often circumstantial, as to which the like considerations apply as in other offenses.[7]

8. **Proof of Another Burning,**—in exception to the general rule that only the particular crime in allegation can be shown, is admissible whenever it tends directly to the establishment of the offense in issue; [8] for example, a pre-

112 Ind. 373, 14 N. E. 241; S. v. Jones, 106 Mo. 302, 17 S. W. 366; S. v. Green, 92 N. C. 779; S. v. Hannett, 54 Vt. 83; McAdory v. S., 62 Ala. 154; S. v. Travis, 39 La. Ann. 356; Hudson v. S., 61 Ala. 333; C. v. Chase, 147 Mass. 597, 18 N. E. 565; Halleck v. S., 65 Wis. 147; P. v. Fong Hong, 120 Cal. 685, 53 Pac. 265; Morgan v. S., 120 Ga. 499, 48 S. E. 238; Noe v. S., 92 Ind. 92; S. v. Barrett, 151 N. C. 665, 65 S. E. 894; Taylor v. Com., 5 Ky. L. 240.

6. Whetston v. S., 31 Fla. 240, 12 So. 661; S. v. Melick, 65 Iowa, 614, 22 N. W. 895; Levy v. P., 80 N. Y. 327; Vol. II, § 1097 (2). See S. v. England, 78 N. C. 552; Ethridge v. S., 124 Ala. 106, 27 So. 320. It may be shown accused prepared to fire the dwelling, or was seen in its neighborhood at suspicious times as, after business hours, S. v. Crawford, 99 Mo. 74, 12 S. W. 354, or about the time of the fire, S. v. Ward, 61 Vt. 153, 17 A. 483; as where he is seen in the crowd and his condition as to dress raises an inference that he has not slept in the building. S. v. Harvey, 130 Ia. 394, 106 N. W. 938. Proof of kerosene stains on the clothing of the accused, S. v. Kingsbury, 58 Me. 238, that earth near the building smelled of kerosene, S. v. Watson, 47 Ore. 543, 85 P. 336, or that the accused had oil in his possession near the building about the time of the fire, P. v. Burridge, 99 Mich. 343, 58 N. W. 319; Thomas v. S., 107 Ala. 13, 18 So. 229; Gawn v. S., 7 Ohio Cir. Dec. 19, is relevant. As to poisoned meat in the possession of the accused where a watch-dog was poisoned on the night of the fire. Halleck v. S., 65 Wis. 147, 26 N. W. 572.

7. Johnson v. S., 48 Ga. 116; Hensley v. S., 9 Humph. 243; C. v. Marshall, 15 Gray, 202; Brooks v. S., 51 Ga. 612; S. v. Vatter, 71 Iowa, 557, 32 N. W. 506; P. v. O'Neill, 112 N. Y. 355, 19 N. E. 796; S. v. West, 1 Houst. Crim. 371; S. v. Crawford, 99 Mo. 74, 12 S. W. 354; Fletcher v. S., 90 Ga. 389, 17 S. E. 101; C. v. Allen, 128 Mass. 46, 35 Am. R. 356; S. v. Ward, 61 Vt. 153. As to circumstantial evidence in general, see Vol. II, §§ 1073-1079; Bolden v. S., 98 Miss. 723, 54 So. 241. Evidence of odor of kerosene on defendant's clothing received. P. v. Bishop, 134 Cal. 682, 66 P. 976.

8. Vol. II, §§ 1120-1129; Reg. v. Gray, 4 Fost. & F. 1102; C. v. Choate, 105 Mass. 451; P. v. Lattimore, 86 Cal. 403, 24 Pac. 1091; S. v. Thompson, 97 N. C. 496, 1 S. E. 921; P. v. Hiltel, 131 Cal. 557, 63 Pac. 919.

vious firing of the building burned, with testimony casting suspicion on the defendant.[9]

9. **Accessories, Accomplices, and other Participants**—are treated the same in arson as in other offenses.[10]

9. S. v. Rohfrischt, 12 La. Ann. 382; P. v. Shainwold, 51 Cal. 468; S. v. Freeman, 4 Jones, N. C. 5. See, as to the limitations. Brock v. S., 26 Ala. 104; S. v. Graham, 121 N. C. 623, 28 S. E. 409. Evidence of other burnings is admitted only to show that the fire was not accidental. P. v. Lattimore, 86 Cal. 403, 24 P. 1091; Meister v. P., 31 Mich. 99; P. v. Fournier (Cal. 1897), 47 P. 1014; P. v. Jones, 123 Cal. 65, 55 P. 698; Smith v. S., 52 Tex. Cr. 80, 105 S. W. 501; Knights v. S., 58 Neb. 225, 78 N. W. 508, 76 Am. St. 78n.

10. S. v. Hayes, 78 Mo. 307; P. v. Thompson, 37 Mich. 118; S. v. Jones, 101 N. C. 719, 8 S. E. 147; Hughes v. S., 75 Ala. 31; C. v. Chase, 147 Mass. 597, 18 N. E. 565; C. v. Holmes, 127 Mass. 424, 34 Am. R. 391; P. v. Jones, 123 Cal. 65, 55 Pac. 698. Sufficiency of evidence. P. v. Bernstein, 250 Ill. 63, 95 N. E. 50; S. v. Peters, 234 Mo. 572, 137 S. W. 878.

CHAPTER XCIX.

ASSAULT AND BATTERY.

Consult—for the law of Assault, New Crim. Law, II, § 22 et seq.; of Battery, Ib., § 70 et seq. And for more of the law, see the Indexes to New Criminal Law. For the forms and questions relating thereto, Dir. & F., §§ 200-229. And consult the indexes to these volumes. For various elucidations as to both law and procedure, see Stat. Crimes, §§ 216, 320, note, 496-499, 500-515.

§ 54. **How Chapter divided.**—We shall consider, I. The Indictment for Simple Assault and Battery; II. The Indictment for Aggravated Assaults and Batteries; III. The Evidence.

I. *The Indictment for Simple Assault and Battery.*

§ 55. 1. **Unnecessary Averments**—abound in the forms in the books for assault and for assault and battery. These and the necessary ones are explained in "Directions and Forms."[11]

2. **For the Necessary Averments**—there are probably no words which do not admit of substitutes. But stripping a common old English form of its redundancies, we have the following: that the defendant, on, etc., at, etc., "in and upon one X, then and there being, did make an assault [thus far the allegation is of a simple assault, now follows that of a battery], and him the said X then and there did beat, wound, and ill-treat, against," etc.[12]

11. Dir. & F., §§ 43-49, 201 et seq. And see Vol. II, §§ 499-504.

12. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 441. "Against the peace," etc. necessary. Vol. I, § 429; Vol. II, §§ 648 (2), 650; Dir. & F., § 666.

3. **Not Double.**—This joining of assault and battery in one count does not render it ill for duplicity.[13] The obvious reason is that a battery includes an assault;[14] and always an allegation of a larger crime so far comprehends all the smaller ones within it as to authorize the pleader to treat the whole as one. So that when he charges a larger offense, he may if he chooses specifically allege any or all of the smaller ones which it in law contains, without adding a separate count.[15]

§ 56. 1. Varying the Words.—While these words are adequate both for assault and for battery,[16] and while they are of dimensions so small that, being established by immemorial usage, it is practically best to retain them, there may be substitutes which the courts will not reject. Thus, the averment that the defendant "did unmercifully whip," a child, "inflicting bruises on her person," was deemed sufficiently to set out a battery.[17] And we shall see in the next section that, therefore, it charges assault also.

2. **On Statute.**—There are States in which this offense is so purely statutory as to require an expansion of the averments beyond those of the common law. This topic is treated in "Statutory Crimes."[18]

13. S. v. Inskeep, 49 Ohio St. 228, 34 N. E. 720.

14. New Crim. Law, I, § 548 (1); II, § 71 (1); P. v. Helbing, 61 Cal. 620; Jacobi v. S., 133 Ala. 1, 32 So. 158, Ap. dismissed 187 U. S. 133, 23 S. Ct. 88; Cox v. S. (Ark. 1911), 136 S. W. 989; S. v. Mills, 3 Pen. (Del.) 588, 52 A. 266; S. v. Brechbiel, 10 Kan. Ap. 575, 62 P. 251; S. v. Climie, 12 N. D. 33, 94 N. W. 574.

15. Vol. I, § 433. Under an indictment for an aggravated assault there may be a conviction of a common or simple assault. Com. v. Crowley, 167 Mass 434, 45 N. E. 766; S. v. Rambo, 92 Mo. 462, 8 S. W. 265; Keeling v. S. (Tex. 1898), 47 S. W. 372.

16. And see post, § 77 (3, 4); Reg. v. Crespin, 11 Q. B. 913; S. v. Burt, 25 Vt. 373; S. v. Graham, 51 Iowa, 72, 50 N. W. 285; S. v. Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. 565; S. v. Bell, 26 Minn. 388, 5 N. W. 970; Bloomer v. S., 3 Sneed,' 66; Reg. v. Guthrie, Law Rep. 1 C. C. 241; Connolly v. P., 3 Scam. 474; Martin v. S., 40 Tex. 19.

17. S. v. Stafford, 113 N. C. 635, 18 S. E. 256, of the like sort is Murdock v. S., 65 Ala. 520.

18. Stat. Crimes, §§ 500-515. And see S. v. Murphy, 21 Ind. 441; S. v. Prather, 54 Ind. 63; Evans v.

§ 57. 1. **"Other Wrongs."**—The old forms allege, after the charge of a battery as in the one above given, that the defendant inflicted "other wrongs" on the person injured; but this allegation is too indefinite to be of any service. True, Archbold says that under it "you may give in evidence any circumstances of aggravation attending the assault and battery, not of themselves amounting to a distinct trespass."[19] You may doubtless do the same under any form that omits it; the circumstances attending any act charged as criminal being admissible in explanation of its character.

2. **Other Superfluous Averments.**—Chitty's form for common assault and battery adds that the injured person's "life was greatly despaired of." But he does not deem this averment necessary, or recommend its use where the assault is slight.[20] Unnecessary also is the old allegation, that the assault was to the "damage" of the assaulted person.[21] "With force and arms,"[22] also "in the peace of God," etc.,[23] are needless.

3. **"Assault"**—we have seen to be the true technical word; and, except under a statute, no good pleader will intentionally experiment with any substitute. If the question were new, it might with some show of reason be doubted whether this word alone would be adequate, since, instead of particularizing the acts, it states a conclusion

S., 25 Tex. Sup. 303; Grayson v. S., 37 Tex. 228; Fulford v. S., 50 Ga. 591; S. v. Trulock, 46 Ind. 289; S. v. Hubs, 58 Ind. 415; Pratt v. S., 49 Ark. 179; S. v. Kinder, 109 Ind. 226, 9 N. E. 917; Boles v. S., 18 Tex. Ap. 422; S. v. Smith, 74 Ind. 557; Hays v. S., 77 Ind. 450; Territory v. Miera, 1 New Mex. 387; Freel v. S., 125 Ind. 166, 25 N. E. 178; S. v. Cummings, 138 Iowa, 522, 105 N. W. 57.

19. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 443, referring to 2 Phil. Ev. 189. And see Lowden v. Goodrick, Peake, 46.

20. 3 Chit. Crim. Law, 821 and note.

21. Vol. II, § 647 (1); S. v. Wimple, 8 Blackf. 214; Dir. & F. § 201.

22. Dir. & F., § 43; Vol. II, § 502 (1). In S. v. Elliott, 7 Blackf. 280, they were held to be unnecessary.

23. Dir. & F., § 47; Vol. II, § 502 (2); S. v. Elliott, supra.

of law.[24] But undoubtedly in the beginning, necessity[25] was deemed to compel this form of averment, for the varying acts which constitute an assault could not well be individualized. And time and usage have settled the question. Also it is sufficiently established that an assault may be alleged without the use of the word;[26] as, a battery includes an assault,[27] and it is often charged without the word assault being joined;[28] and upon such an indictment there may be a conviction for simple assault.[29] Even where there is no charge of a battery, it is possible to set out an assault without using the word "assault."[30]

4. **"Then and There."**—The allegation that the defendant at, etc., on, etc., did feloniously assault X, and being then and there armed with a dangerous weapon did actually strike him on his head with it, not repeating "then and there" before "did actually strike," was adjudged sufficient.[31]

§ 58. "Wilfully" — "Unlawfully" — "Maliciously."—The word "assault" includes the idea of illegality;[32] hence it need not be specified that the act was done "maliciously,"[33] or even "wilfully," or "unlawfully,"[34] though it is otherwise in an indictment under a statute in these terms.[35]

24. Vol. I, § 331 (2); Vol. II, § 515 (1); Roberson v. S., 15 Tex. Ap. 317, 318. And see observations of Perryn, B. post, § 76 (1).

25. Vol. II, §§ 493-498.

26. Ante, § 56 (1).

27. New Crim. Law, II, § 72.

28. See forms in 3 Chit. Crim. Law, 823, 825, 827.

29. Reg. v. Taylor, Law Rep. 1 C. C. 194, 195; Reg. v. Canwell, 11 Cox C. C. 263.

30. See and compare S. v. Munco, 12 La. Ann. 625; C. v. Woodson, 9 Leigh, 669; Reg. v. Mulroy, 3 Crawf. & Dix C. C. 318; Reg. v. Dingman, 22 U. C. Q. B. 283.

31. C. v. Bugbee, 4 Gray, 206. And see S. v. Brown, 3 Heisk. 1.

32. S. v. Hays, 41 Tex. 526; S. v. Hartman, 41 Tex. 562; Shinn v. S., 68 Ind. 423. See, S. v. Creighton, 98 Me. 424, 57 A. 592.

33. U. S. v. Lunt, 1 Sprague, 311. See Richels v. S., 1 Sneed, 606; S. v. Ostman, 147 Mo. Ap. 422, 126 S. W. 961.

34. S. v. Bray, 1 Mo. 180; Vol. II, § 503; S. v. Boyer, 70 Mo. App. 156.

35. S. v. Langston, 45 La. Ann. 1182, 14 So. 137; S. v. Robinson,

§ 59. 1. **Joinder of defendants—Degree of Principal.**—This offense may be charged against two or more jointly.[36] And it makes no difference that they are principals of different degrees; as. where one does the act, and another is present abetting him,[37] the indictment may if the pleader chooses aver that both did it, according to the legal effect. As to—

2. **How far the Thing done must appear Possible**—we have partly considered.[38] The Missouri court adjudged it ill to say that the defendants, "with a knife which *they* with *their right hand* held, made an assault;" because, in the nature of things, several persons cannot jointly have one right hand.[39] In another case, the same court got rid of a form of words not greatly dissimilar, by rejecting them as surplusage.[40] But the Connecticut court, as we shall by and by see,[41] held good an allegation that two thrust "their hand" into the pocket of a woman, with intent to steal.[42]

§ 60. **On More Persons than One**—an assault may be laid as committed, if the fact is so.[43] Then, according to an Iowa case, the proofs must cover the whole charge, an assault or beating of one alone being inadequate.[44] But,

104 La. 224, 28 So. 1002; as to use of word "feloniously," see, Ervington v. P., 181 Ill. 408, 54 N. E. 891; S. v. Young, 104 La. 201, 28 So. 984; S. v. Bond, 191 Mo. 555, 90 S. W. 830.

36. Vol. II, § 469; Fowler v. S., 3 Heisk. 154; Reg. v. Gordon, 1 Cox, C. C. 259; Lewis v. S., 33 Ga. 131.

37. Ante, § 3; S. v. McClintock, 8 Iowa, 203. See, S. v. Erickson, 57 Ore. 262, 110 P. 785; rehearing denied, 57 Ore. 262, 111 P. 17.

38. Ante, § 6a.

39. S. v. Gray, 21 Mo. 492.

40. S. v. Dalton, 27 Mo. 13. See S. v. McDonald, 67 Mo. 1.

41. Post, § 89.

42. See also, S. v. Farley, 14 Ind. 23.

43. Vol. I, § 437 (4, 5); Fowler v. S., 3 Heisk. 154; S. v. Bradley, 34 Tex. 95; Kenney v. S., 5 R. I. 385. Ames, C. J. observing: "It is true that in Rex v. Clendon, 2 Stra. 870, 2 Ld. Raym. 1572, an indictment was held bad upon this ground. In Rex v. Benfield, 2 Bur. 980, 983, 984, however, the King's Bench overruled this case, declaring 'it not to be law.'" P. 387; S. v. Boyer, 70 Mo. Ap. 156.

44. S. v. McClintock, 8 Iowa, 203.

in reason, an assault on A and B is an assault both on A and likewise on B; and when it is proved as to one, a complete offense appears equally in the evidence and in the allegation. So the Massachusetts court has since held; namely, that the charge may be of an assault on two, but the proofs need sustain it only as to one.[45]

§ 61. **Assaults by Two on Each Other**—have been considered in various connections.[46] Assuming that what is done constitutes an assault and battery, there may, perhaps, be circumstances in which each will be so far responsible for the blows of the other that the two may be charged jointly in one indictment. Ordinarily, on principle, they cannot be, and there should be two indictments. Still, in the language of English, C. J., "the offenses being misdemeanors and of the same nature, the offenders may, it seems, be joined in the same indictment, if 'severally' charged.[47] But it is not proper to do so, because the court has the discretion to quash the indictment."[48]

§ 62. **The Name of the Assaulted Person**—must be alleged if known;[49] or if unknown, the indictment must so state,[50] In matter of fact, he must have been living at the time of the assault; yet it is not objectionable to mention him as "deceased." if on the whole allegation he appears to have been then living.[51]

45. C. v. O'Brien, 107 Mass. 208.

46. New Crim. Law, I, § 260 (3) and note, 535; II, § 35; ante, § 24 (2). And see these places as to when the act is indictable; also C. v. Collberg, 119 Mass. 350, 20 Am. R. 328, compared with C. v. Welsh, 7Gray, 324, in connection with the Massachusetts statute, ante, § 24.

47. Vol. II, §§ 473-476.

48. S. v. Lonon, 19 Ark. 577.

49. Johnson v. S., 46 Ga. 269; Gahan v. P., 58 Ill. 160; C. v. Gray, 2 Cush. 535; Hart v. S., 38 Tex. 382; Harne v. S., 39 Md. 552; P. v. Murray, 2 Mich. N. P. 94; S. v. Bitman, 13 Iowa, 485; Ranch v. S., 5 Tex. Ap. 363; Black v. S., 57 Ind. 109. And see S. v. Crawford, 66 Iowa, 318, 23 N. W. 684; Henry v. S., 7 Tex. Ap. 388. As to error in repeating name. Catlett v. S. (Tex.) 61 S. W. 485.

Human being. To say that the assault was on "one John Coffey" sufficiently alleges that it was on a human being. P. v. Forney, 81 Cal. 118.

50. P. v. White, 55 Barb. 606.

51. C. v. Ford, 5 Gray, 475.

II. *The Indictment for Aggravated Assaults and Batteries.*[52]

§ 63. 1. The Doctrine—of this sub-title is the common one, that every element which the law has made essential to the offense must be alleged with due particularization; as, that a simple assault, or battery, or both, whichever is the basis of the crime, must be charged in the manner directed in the last sub-title; adding, or incorporating into this averment, the law's aggravation,[53] which will generally be statutory, according to its special facts, and, when it is statutory, within the rules of pleading upon a statute.[54]

2. The Degrees of Assault,—under the common law and the statutes, are numerous. The lowest degree is a simple assault. Another degree is formed by adding a battery to it. Another by adding to it, or to assault and battery, the intent to do a specified ultimate wrong.[54a] Another, by add-

52. And see Stat. Crimes, §§ 500-515.

53. New Crim. Law, II, §§ 42-54; P. v. Perales, 141 Cal. 581, 75 P. 170. "Felonious" not used. Ter. v. Gonzales, 14 N. M. 31, 89 P. 250.

54. Griffin v. S., 12 Tex. Ap. 423; Knight v. S., 84 Ind. 73; Key v. S., 12 Tex. Ap. 506; Buntin v. S., 68 Ind. 38; S. v. Phillips, 104 N. C. 786, 10 S. E. 463; P. v. Vierra, 52 Cal. 451; P. v. Savercool, 81 Cal. 650, 22 P. 856; S. v. Jenkins, 120 Ind. 268, 22 N. E. 133; Meier v. S., 10 Tex. Ap. 39; Flynn v. S., 8 Tex. Ap. 368; S. v. Moore, 82 N. C. 659; S. v. Hooper, 82 N. C. 663; S. v. Benthall, 82 N. C. 664; P. v. Forney, 81 Cal. 118, 22 P. 481; Marshall v. S., 13 Tex. Ap. 492; S. v. Meinhart, 73 Mo. 562; S. v. Tidwell, 43 Ark. 71; P. v. Turner, 65 Cal. 540, 4 P. 553; S. v. Langston, 45 La. Ann. 1182, 14 So. 137; S. v. Tyler, 46 La. Ann. 1269, 15 So. 624; Pollock v. S., 60 Tex. Cr. Ap. 265, 131 S. W. 1094; Hamilton v. S., 60 Tex. Cr. Ap. 258, 131 S. W. 1127.

54a. The specific intent is the gist of the crime and must be sufficiently set forth. Hogan v. S., 42 Fla. 562, 28 So. 763; Ruis v. S., 43 Fla. 186, 30 So. 802; Gray v. S., 44 Fla. 413, 33 So. 295. The intent must connect with the assault in point of time. Anderson v. S., 44 Fla. 413, 33 So. 294; as to necessity to allege an intent to commit felony. Pyke v. S., 47 Fla. 93, 36 So. 577; S. v. Norman, 136 Mo. 1, 37 S. W. 827; Davis v. U. S., 16 Ap. D. C. 442. "Malice aforethought" though often employed, may be omitted. S. v. Shunka, 116 Iowa, 206, 89 N. W. 977; S. v. Kelly, 41 Oreg. 20, 68 P. 1; S. v. Michel, 20 Wash. 162, 54 P. 995; S. v. Bellard, 50 La. Ann. 594, 23 So. 504, 69 Am.

ing the use of some instrument implying special danger. Another, by its being made on a person of a special class. And in some of the States there are very many degrees.[55] Generally each degree above assault, or assault and battery, is punished more heavily than the lower; and when it is, the indictment must set out the aggravating matter which gives it the particular degree.[56]

3. **Not Separate Counts**—are required; but a simple and aggravated or compound assault may be alleged in one;[57] and the conviction be for the whole, or for any part which, being well laid, is proved.[58] This doctrine extends even

St. 461; S v. McDonald, 14 Utah, 173, 46 P. 872.

55. Cokely v. S., 4 Iowa, 477. The indictment must charge the particular intent. Ruis v. S., 43 Fla. 186, 30 So. 802. See also S. v. Hendrickson, 165 Mo. 262, 65 S. W. 550.

56. Vol. I, § 82; Sloan v. S., 42 Ind. 570; S. v. Brown, 21 La. Ann. 347; Ash v. S., 56 Ga. 583; Hollohan v. S., 32 Md. 399; S. v. Jennings, 35 Tex. 503; Greenwood v. S., 35 Tex. 587; Stewart v. S., 4 Tex. Ap. 519; Browning v. S., 2 Tex. Ap. 47; Bronson v. S., 2 Tex. Ap. 46; Bowden v. S., 2 Tex. Ap. 56; Coney v. S., 2 Tex. Ap. 62; Haynes v. S., 2 Tex. Ap. 84; Nelson v. S., 2 Tex. Ap. 227; Chamberlain v. S., 2 Tex. Ap. 451; Samner v. S., 2 Tex. Ap. 458; Pugh v. S., 2 Tex. Ap. 539; Wilks v. S., 3 Tex. Ap. 34; C. v. Fenno, 125 Mass. 387; S. v. Chumley, 67 Mo. 41; Williamson v. S., 5 Tex. Ap. 485; Rountree v. U. S., 1 Pin. 59; C. v. McGahey, 11 Gray, 194; S. v. Roberts, 52 N. H. 492; S. v. Cassady, 52 N. H. 500; S. v. Russell, 91 N. C. 624; Territory v. Sevailles, 1 New Mex. 119; S. v. Green, 36 La. Ann. 99; S. v. Beadon, 17 S. C. 55; Compare, Brown v. S., 3 Okla. Cr. Ap. 42, 104 P. 78. Assault defined. S. v. Custer, 85 Kan. 445, 116 P. 507. Assault and battery defined. S. v. Honey (Del. 1911), 80 A. 240; S. v. Brittingham (Del. 1911), 80 A. 242.

57. Vol. I, § 433; ante, § 55 (3); S. v. Twogood, 7 Iowa, 252; S. v. Farley, 14 Ind. 23; Cokely v. S., supra; P. v. Casey, 72 N. Y. 393; C v. Thompson, 116 Mass. 346.

58. Gillespie v. S., 9 Ind. 380; Foley v. S., 9 Ind. 363; Brantley v. S., 13 Sm. & M. 468; Reg. v. Nicholls, 9 Car. & P. 267; Orton v. S., 4 Green (Iowa), 140; Lewis v. S., 33 Ga. 131; P. v. McDonald, 9 Mich. 150; S. v. De Laney, 28 La. Ann. 434; S. v. Robey, 8 Nev. 312; S. v. McAvoy, 73 Iowa, 557; S. v. Howes, 26 W. Va. 110; Milstead v. S. 19 Tex. Ap. 490; Clarke v. Territory, 1 Wash. Ter. 68; S. v. Grear, 29 Minn. 221; Curry v. S., 120 Ala. 366, 25 So. 237; S. v. Guglielmo, 4 Pennewell (Del.), 336, 55 A. 950; Freeman v. S., 50 Fla. 38, 39 So. 785; Harris v. S., 120 Ga. 167, 47 S. E. 520; S. v. Tankersley, 60 Kan. 859, 57 P. 965; Com. v. Yarnell, 24

to cases where the aggravated act is known as a crime of another name,[59] but is limited by some rules appearing elsewhere.[60]

§ 63 a. Instances of the Leading Rules—are—

1. **Both Simple and Aggravated.**—The count, as just indicated, should set out an assault, or a battery, or an assault and battery, as the law on which it is drawn may specify;[61] and this allegation should accord with the rules for it in the particular State.[62] The aggravating matter may be made to appear by adjectives or by other qualifying words indicative of the manner of the assault or battery,[63] or by an added clause,[64] or both;[65] the requirement being that the charge shall be brought within the statutory terms, and be sufficiently full, as in other cases of indictments on statutes.[66]

Ky. L. 144, 68 S. W. 136; P. v. Townsend, 120 Mich. 661, 79 N. W. 901; S. v. Prosser, 137 Mo. 627, 38 S. W. 1106; S. v. Maloney, 7 N. D. 119, 72 N. W. 927; S. v. Kelley, 41 Ore. 20, 68 P. 1.

59. Vol. I, §§ 415-420; Reg. v. Guthrie, Law Rep. 1 C. C. 241; Benham v. S., 1 Iowa, 542; S. v. Webster, 39 N. H. 96. Assault with intent to do great bodily harm is not necessarily included in rape. S. v. McDonough, 104 Iowa, 6, 73 N. W. 357.

60. New Crim. Law, I, §§ 787-789, 798-815. And see, as to the subject of this paragraph, Stat. Crimes, § 500 et seq.; S. v. Gummell, 22 Minn. 51.

61. Miller v. S., 53 Miss. 403; ante, § 63 (1).

62. Ante, § 56 (2).

63. S. v. Seward, 42 Mo. 206; Williams v. S., 42 Miss. 328; S. v. Ray, 37 Mo. 365; S. v. Franklin, 36 Tex. 155; S. v. McDonald, 14 Utah, 173, 46 P. 872, "did assault with intent to kill and murder" has been held sufficient without alleging the accused had the present ability to execute the intent. S. v. Levan, 23 Wash. 547, 63 P. 202; Guy v. S., 37 Ind. Ap. 691, 77 N. E. 855; Knight v. S., 44 Fla. 94, 32 So. 110.

64. Taylor v. C., 3 Bush, 508; P. v. English, 30 Cal. 214; Carder v. S., 17 Ind. 307; S. v. Hunter, 44 Tex. 94; S. v. Murrah, 25 Tex. 758; Reg. v. Cruse, 2 Moody, 53, 8 Car. & P. 541.

65. S. v. Seward, supra; P. v. Congleton, 44 Cal. 92; Rasberry v. S., 1 Tex. Ap. 664; Prior v. S., 41 Ga. 155; S. v. McGinnis, 12 La. Ann. 743; P. v. War, 20 Cal. 117.

66. Stat. Crimes, §§ 501-515; Baker v. P., 49 Ill. 308; S. v. Fee, 19 Wis. 562; P. v. Swenson, 49 Cal. 388; Robinson v. S., 31 Tex. 170; Fulford v. S., 50 Ga. 591; S. v. Jordan, 19 Mo. 212; S. v. White, 14 Kan. 538; S. v. Flborn, 27 Md. 483; S. v. Little, 67 Mo. 624; S. v. Daley, 41 Vt. 564; Wilson v. P., 24 Mich

2. **Surplusage.**—Words insufficient as to the aggravation may still leave the indictment good for a simple assault, or assault and battery; being rejected as surplusage.[67] And there may be other surplusage within this rule.[68]

3. **Aggravations not Affecting the Punishment**—to be inflicted, otherwise than as influencing the discretion of the court, need not be mentioned unless the pleader chooses;[69] but as we have seen,[70] whatever is in law essential to the heavier punishment must be, or it cannot be imposed.[71]

§ 64. 1. **The Minuteness**—with which this matter of aggravation must be averred is better explained by illustration than by rule. If the offense consists of an assault, or a battery, inflicted with an intent to commit a heavier crime, such heavier crime need not be set out with the formalities of an indictment for it, but the statement of such intent in ordinary words suffices.[72] And an indictment for

410; S. v. Johnson, 9 Nev. 175; Reddan v. S., 4 Greene (Iowa), 137; S. v. Shepard, 10 Iowa, 126; S. v. Doty, 5 Or. 491; C. v. Welsh, 7 Gray, 324; S. v. Garvey, 11 Minn. 154; Manigault v. S., 53 Ga. 113; Robertson v. S., 31 Tex. 36; Martin v. S., 40 Tex. 19; Bittick v. S., 40 Tex. 117; S. v. Cass, 41 Tex. 552; Meredith v. S., 40 Tex. 480; Mayfield v. S., 44 Tex. 59; S. v. Rigg, 10 Nev. 284. As to indictments under various statutes, See, U. S. v. Tucker, 122 F. 518; S. v. Hammerli, 60 Kan. 860, 58 P. 559; Collins v. Com., 24 Ky. L. 884, 70 S. W. 187; S. v. Hopkins, 115 La. 786, 40 So. 166; S. v. Prosser, 137 Mo. 624, 38 S. W. 1106; S. v. Cruikshank, 13 N. D. 337, 100 N. W. 697; S. v. McDonald, 14 Utah, 173, 46 P. 872; S. v. McCormick, 20 Wash. 94, 54 P. 764.

67. Wood v. S., 50 Ala. 144; Nelson v. S., 2 Tex. Ap. 227; Higginbotham v. S., 50 Ala. 133; P. v. O'Neil, 48 Cal. 257; C. v. Hawkins, 11 Bush, 603; Kruger v. S., 1 Neb. 365; S. v. Archer, 34 Tex. 646; Blackburn v. S., 39 Tex. 153; Johnson v. S., 26 Tex. 117; C. v. Delehan, 148 Mass. 254; P. v. Owens, 3 Cal. 750, 86 P. 980; S. v. Spaugh, 199 Mo. 147, 97 S. W. 901.

68. P. v. Casey, 72 N. Y. 393; S. v. Samuels, 38 La. Ann. 457; P. v. Ozlar (Cal. Ap. 1908), 97 P. 685.

69. Vol. I, § 85; ante, § 56; S. v. Belk, 76 N. C. 10; S. v. Young, 7 Rich. 1.

70. Ante, § 63.

71. Vol. I, § 77 et seq.

72. Post, §§ 76 (1), 77 (2); Hayes v. S., 15 Lea, 64; S. v. Montgomery, 7 Bax. 160; McGuire v. S., 50 Ind. 284; Bunlin v. S., 68 Ind. 38; Com. v. Crowley, 167 Mass. 434, 45 N. E. 766; S. v. Kunz, 90 Minn. 526, 97 N. W. 131; Young v. Ter., 8 Okla. 525, 58 P. 724. Under stat-

assault with intent to murder need not allege the mode of it or the means and weapon used;[73] or, if committed by several defendants, the specific acts of each.[74] And these illustrations have their numerous similitudes.[75]

2. **Weapon.**—It is good to allege that the assault was with a "deadly weapon" where these are the statutory words, without any further description of it.[76] On the charge of an assault with an axe, there need be no added allegation that the axe is a dangerous weapon.[77] Not even the instrument or its name requires mention, unless by reason of something in the statute, or made essential by its particular form.[78]

ute punishing assault under circumstances constituting murder if death ensued, indictment need not allege act was willfully or with malice or intent to kill. S. v. Nieuhaus, 217 Mo. 332, 117 S. W. 73.

73. S. v. Jackson, 37 La. Ann. 467; Lacefield v. S., supra. And see S. v. Miller, 25 Kan. 699; S. v. Taylor, 83 N. C. 601; S. v. De Long, 89 Ark. 391, 117 S. W. 524; S. v. Parr, 54 Ore. 316, 103 P. 434; Davis v. U. S., 16 Ap. D. C. 442; S. v. Steineman, 162 Mo. 188, 62 S. W. 694.

74. Hamilton v. P., 113 Ill. 34, 55 Am. R. 396.

75. S. v. Bradford, 33 La. Ann. 921; P. v. Ah Toon, 68 Cal. 362, 9 Pac. 311; Logan v. S., 2 Lea, 222; Parsons v. S., 9 Tex. Ap. 204; Davis v. S., 20 Tex. Ap. 302; S. v. Dalby, 86 S. C. 367, 68 S. E. 633.

76. S. v. Seamons, 1 Greene (Iowa), 418. And see S. v. Swann, 65 N. C. 330; Mayfield v. S., 44 Tex. 59; Burton v. S., 3 Tex. Ap. 408, 30 Am. R. 146; Forrest v. S., 3 Tex. Ap. 232; Canterberry v. S., 90 Miss. 279, 43 So. 678; Spradley v. S., 80 Miss. 82, 31 So. 534; McLendon v. S. (Tex. Cr. Ap. 1902), 66 S. W. 553. To add a minute description of the weapon is permissible. Sumpter v. S., 45 Fla. 106, 33 So. 981. Under statute providing for punishing one who shall stab with a sword, knife or other deadly weapon an indictment for stabbing with a knife need not allege it was a deadly weapon. Sprague v. Com., 22 Ky. L. 519, 58 S. W. 430; S. v. Laycock, 141 Mo. 274, 42 S. W. 723; S. v. Williams, 191 Mo. 205, 90 S. W. 448; Jackson v. Com., 96 Va. 107, 30 S. E. 452; S. v. Broussard, 107 La. Ann. 189, 31 So. 637.

77. Dollarhide v. U. S., Morris, 233, 39 Am. D. 460.

78. Montgomery v. S., 4 Tex. Ap. 140; Payne v. S., 5 Tex. Ap. 35; S. v. Moore, 65 Mo. 606. See S. v. O'Flaherty, 7 Nev. 153; S. v. Roderigas, 7 Nev. 328; Coratola v. U. S., 24 Ap. D. C. 229; Mathis v. S., 39 Tex. Cr. 549, 47 S. W. 464; Davis v. U. S., 16 Ap. D. C. 442. Indictment need not allege a pistol was loaded, that defendant fired it, that person assaulted was struck

3. **Applications of these Rules**—will appear under the titles Attempt,[79] Homicide,[80] Rape,[81] Abortion,[82] and some others.

III. *The Evidence.*

§ 65. 1. **The Name**—of the assaulted person being necessary in allegation,[83] it must be proved,[84] and any variance therein will be fatal.[85] If the assault is shown to have been committed on one of the name averred, it will be no objection that there are others of the same name,[86] or that the same person is also known by other names.[87] The jury are to judge, under instructions from the court,[88] of the evidence of the name, the same as of any other evidence in the case.[89]

2. **The Character of the Assaulted Person,**—when not influencing the degree of the offense,[90] is ordinarily not admissible, especially if not known to the defendant. But under special circumstances, what was thus known may be relevant,[91]—matter more particularly explained under the

with it or with a shot from it, that it was a deadly weapon. Pyke v. S., 47 Fla. 93, 36 So. 577.

79. Post, §§ 77-85.

80. Post, §§ 643-659.

81. Post, §§ 976, 977; Stat. Crimes, §§ 480-499.

82. Stat. Crimes, §§ 751-759.

83. Ante, § 62.

84. McLaughlin v. S., 52 Ind. 279; McLaughlin v. S., 52 Ind. 476; S. v. Boylson, 3 Minn. 438.

85. Swails v. S., 7 Blackf. 324; C. v. Booth, 2 Va. Cas. 394; Brown v. S., 16 Tex. Ap. 197; Walker v. S., 134 Ala. 86, 32 So. 703; Jacobs v. S., 46 Fla. 157, 35 So. 65; Harrington v. P., 90 Ill. Ap. 456; Ratcliff v. S., 23 Ind. Ap. 64, 54 N. E. 814.

86. Rex v. Peace, 3 B. & Ald. 579.

87. Johnson v. S., 46 Ga. 269.

88. S. v. Curran, 18 Mo. 320; Com. v. Warren, 167 Mass. 53, 44 N. E. 1073.

89. C. v. O'Baldwin, 103 Mass. 210; C. v. Stone, 103 Mass. 421.

Disturbing peace of family. An indictment under a statute for disturbing the peace of the family of Mary Riggs was held to be supported by evidence that she was in fact the head of the family, though she had living a husband who had abandoned her. S. v. Slater, 22 Mo. 464.

90. S. v. Burt, 25 Vt. 373; S. v. Jackson, 17 Mo. 544, 59 Am. D. 281.

91. S. v. Meader, 47 Vt. 78; Stevens v. S., 1 Tex. Ap. 591; S. v. Schleagel, 50 Kan. 325; S. v. Paterno, 43 La. Ann. 514, 9 So. 442;

title Homicide.[92]

3. **Weapon—Wound.**—If several weapons are the alleged instruments of assault, proof of any one of them which in law makes the offense complete will suffice.[93] The wound must not appear to have been inflicted by a weapon other than that stated [94] or implied; [95] except where the allegation is surplusage, and perhaps in some other exceptional cases.[96] Yet this evidence may be circumstantial.[97] For example,—

Lewallen v. S., 6 Tex. Ap. 475; Upthegrove v. S., 37 Ohio St. 662; Shields v. S., 32 Tex. Cr. 498, 23 S. W. 893; Com. v. De Vico, 207 Mass, 251, 93 N. E. 570; Rufus v. S., 117 Ala. 131, 23 So. 144; Rhea v. S., 37 Tex. Cr. 138, 38 S. W. 1014; Wilson v. S. (Tex. 1902), 67 S. W. 106; P. v. Meert, 157 Mich. 96, 121 N. W. 318; Woods v. S., 90 Miss. 245, 43 So. 433. Evidence as to physical condition of person assaulted may be reviewed. Beavers v. S., 151 Ala. 5, 44 So. 401.

92. Post, §§ 609-630.

93. S. v. McClintock, 1 Greene (Iowa), 392; P. v. Casey, 72 N. Y. 393. A club, S. v. Phillips, 104 N. C. 786, 10 S. E. 463, a large stone, Regan v. S., 46 Wis. 256, 50 N. W. 287, a loaded gun or a pistol, S. v. Painter, 67 Mo. 84; Wilson v. S., 37 Tex. Cr. 156, 38 S. W. 1013; Henningburg v. S., 153 Ala. 13, 45 So. 246, or one unloaded and used as a club, Riggs v. Com., 17 Ky. L. 1015, 33 S. W. 413; Allen v. P., 82 Ill. 610, or a knife when in striking distance, Walters v. S., 37 Tex. Cr. 388, 35 S. W. 652; Ferguson v. S., 6 Tex. Ap. 504; Brown v. S., 142 Ala. 287, 38 So. 268; S. v. Spaugh, 199 Mo. 147, 97 S. W. 901, is in law a deadly weapon. The character of the weapon if the evidence is conflicting, is for the jury, Smallwood v. Com., 17 Ky. L. 1134, 33 S. W. 822; P. v. Leyba, 74 Cal. 407, 16 P. 200.

94. Ferguson v. S., 4 Tex. Ap. 156; McGee v. S., 5 Tex. Ap. 492. See P. v. Cavanagh, 62 How. Pr. 187; S. v. Phillips, 104 N. C. 786, 10 S. E. 463; Melton v. S., 30 Tex. Ap. 273.

95. Rex v. McDermott, Russ. & Ry. 356; Kouns v. S., 3 Tex. Ap. 13. And see Johnson v. S., 35 Ala. 363.

96. Post, § 514; Ryan v. S., 52 Ind. 167.

97. Vol. II, §§ 1073-1079, 1101; post, § 97; New Crim. Law, I, §§ 735, 736; Taliaferro v. S., 40 Tex. 522; Bradley v. S., 10 Sm. & M. 618; S. v. Napper, 6 Nev. 113; S. v. Doty, 5 Or. 491; S. v. Jackson, 17 Mo. 544, 59 Am. D. 281; C. v. Silk, 111 Mass. 431; Monday v. S., 32 Ga. 672, 79 Am. D. 314; Reg. v. Cox, 1 Fost. & F. 664; Brown v. S., 55 Ga. 169; Roberts v. P., 19 Mich. 401; Corneille v. S., 16 Ind. 232; P. v. Kerrains, 1 Thomp. & C. 333; Anderson v. S., 1 Tex. Ap. 730; Lockwood v. S., 1 Tex. Ap. 749; Coney v. S., 2 Tex. Ap. 62; Doyle v. S., 5 Tex. Ap. 442; Scott v. S., 48 Ala.

§ 66. 1. **Presumptions,**—considered in a general way in the first volume,[98] are among the proofs of this offense; as, an injury inflicted by violence is presumed intended,[99] a pistol pointed at a man's head and fired, making a loud report and wounding him, is presumed to have been loaded with a ball, which and not the wadding inflicted the wound, though no ball was found.[1] And broadly, on the accusation of an assault with a loaded pistol, the presumption appears to be that it was loaded.[2] So,—

2. **If a Wife in Presence of her Husband**—commits assault and battery, his consent, should he not restrain her, may be inferred by the jury, who will convict both.[3]

§ 67. 1. **The Intent.**—The practitioner should inquire whether, in the particular case, a specific evil intent—as, to commit rape, to take life, or the like—as in law an essential element in the offense, or whether a general evil mind will suffice. If the former, there must be evidence, not merely of the assault, but from which also the jury may infer the specific purpose.[4]

420; Field v. S., 50 Ind. 15; Tatum v. S., 59 Ga. 638; S. v. Davenport, 156 N. C. 596, 72 S. E. 7; Bartell v. S., 4 Okla. Cr. 135, 111 P. 669; S. v. Moore (Del. 1910), 74 A. 1112; Pumphrey v. S., 156 Ala. 103, 47 So. 156; Gibson v. Com., 31 Ky. L. 945, 104 S. W. 351 (rape); Woodson v. Com., 107 Va. 895, 59 S. E. 1097; Taylor v. S., 82 Ark. 540, 102 S. W. 367. An assault which if it had been completed by the death of its victim would have been murder in either degree presumes an intent to kill. Roberson v. S., 94 Ark. 69, 126 S. W. 88; S. v. Pope (Del. 1910), 76 A. 367; Darnell v. S., 58 Tex. Cr. 585, 126 S. W. 1122; S. v. Moore (Del. 1910), 74 A. 1112; S. v. Lee (Del. 1909), 74 A. 4.

98. Vol. II, §§ 1096-1131.

99. McConnel v. S., 25 Tex. Ap. 329; Perkins v. S. (Tex. 1911), 138 S. W. 133.

1. Rex v. Weston, 1 Leach, 247.

2. Allen v. P., 82 Ill. 610; Burton v. S., 3 Tex. Ap. 408, 30 Am. R. 146. See post, § 96; Lockland v. S., 45 Tex. Cr. 87, 73 S. W. 1054; Flowers v. S., 4 Okla. Cr. 320, 111 P. 675; McDonald v. S., 46 Fla. 149, 35 So. 72.

3. Phillips v. Phillips, 7 B. Monr. 268. This is a civil case, but the presumption would not be otherwise on an indictment. And see New Crim. Law, I, § 735.

4. New Crim. Law, I, § 735; S. v. Jefferson, 3 Harring. Del. 571; S. v. Daley, 41 Vt. 564; Garrity v. P., 70 Ill. 83; S. v. Glovery, 10 Nev. 24; Maxwell v. S., 3 Heisk. 420; P. v. Mendenhall, 135 Cal. 344, 67 P.

2. **Prior Declarations**—of purpose are admissible.[5] Also—

3. **Observations Evincing Hate**—to the assaulted person, even those made the next day, have been admitted.[6] So—

325; Likens v. S., 63 Neb. 249, 88 N. W. 506; Atkinson v. S. (Tex. 1911), 138 S. W. 125; Crawford v. S., 21 Tex. Ap. 454, 1 S. W. 446; Smith v. S., 39 Miss. 521; S. v. King, 86 N. C. 603; Cowley v. S., 10 Lea (Tenn.) 282; Com. v. Adams, 114 Mass. 323, 324, 19 Am. 362; S. v. Sears, 86 Mo. 169, 174; S. v. Carver, 89 Me. 74, 35 A. 1030; Clardy v. S., 96 Ark. 52, 131 S. W. 46; Cooper v. S., 60 Tex. Cr. 441, 132 S. W. 355; Roberson v. S., 94 Ark. 69, 126 S. W. 88; S. v. Pepe (Del. 1910), 76 A. 367; S. v. Moore (Del. 1910), 74 A. 1112; Horton v. P., 47 Colo. 252, 107 P. 257; McAllister v. S., 7 Ga. Ap. 541, 67 S. E. 221; Chowning v. S., 91 Ark. 503, 121 S. W. 735; Crumley v. S., 5 Ga. Ap. 231, 62 S. E. 1005; S. v. Espenscheid, 212 Mo. 215, 110 S. W. 1072 (intent to rape); Bowman v. Com., 31 Ky. L. 828, 104 S. W. 263 (rape); Cotton v. S. 105 S. W. 185 (rape); Ward v. S., 58 Neb. 719, 79 N. W. 725; Dillard v. S., 65 Ark. 404, 46 S. W. 533.

5. Vol. II, § 1110; Read v. S., 2 Ind. 438. Threats and the hostility of the accused are always received. S. v. Henn, 39 Minn. 476, 40 N. W. 572. Claiming to act in self-defense he may prove the injured party threatened him. Bolton v. S. (Tex. Cr. 1897), 39 S. W. 672; Rauck v. S., 110 Ind. 384, 11 N. E. 450; Martin v. S., 5 Ind. Ap. 453, 456. Declarations of all persons at the time of the assault are relevant. Blount v. S., 49 Ala. 381; Colquitt v. S., 34 Tex. 550. As to threats see Dowell v. S., 58 Tex. 482, 126 S. W. 871; S. v. Winnett, 48 Wash. 93, 92 P. 904 (rape); Waldron v. S., 41 Fla. 265, 26 So. 701; S. v. Thompson, 127 Iowa, 440, 103 N. W. 377; S. v. Lawrence, 70 Vt. 524, 41 A. 1027.

6. Meeks v. S., 51 Ga. 429; S. v. McKellar, 85 S. C. 236, 67 S. E. 314. And see S. v. Fry, 67 Iowa, 475, 25 N. W. 738. The intent to do bodily harm, or to kill, may be inferred from the force or direction of the blow, from the natural result of violence employed. P. v. Conley, 106 Mich. 424, 64 N. W. 325; P. v. Miller, 91 Mich. 639, 643, 52 N. W. 65; Hill v. S., 37 Tex. Cr. 279, 38 S. W. 987, 39 S. W. 666, 66 Am. St. 803, from the weapon used. S. v. Dickerson, 98 N. C. 708, 3 S. E. 687; P. v. Smith, 106 Mich. 431, 64 N. W. 200; Dean v. S., 89 Ala. 46, 8 So. 38; S. v. Broadbent, 19 Mont. 467, 48 P. 775, or from any deliberate conduct usually resulting in danger to the life of another. Conn v. P., 116 Ill. 458, 464, 6 N. E. 463; Cowley v. S., 10 Lea (Tenn.) 282, 284; Com. v. Randall, 4 Gray (Mass.) 36; S. v. Aleck, 41 La. Ann. 83, 5 So. 639; P. v. Miller, 91 Mich. 639, 644, 52 N. W. 65; Ullman v. S., 124 Wis. 602, 103 N. W. 6; Combs v. S., 55 Tex. Cr. 332, 116 S. W. 595.

4. **Confessions** [7]—**Threats** [8]—are admissible.

5. **Prior Conduct and Relations**—of the parties may be shown or not according as the evidence tends or not to establish the issue. The circumstances of cases within this doctrine are multitudinous.[9] In one it was deemed that what took place between the two in the forenoon, the assault being in the evening, was too remote to be of the *res gestae,* so not admissible.[10] In another, to show resentment by the defendant toward the person assaulted, and a consequent motive, the State was permitted to prove that the latter had said in the hearing of the former, shortly before the transaction, that "no honest man would avail himself of the bankrupt act;" in connection with the further fact that the defendant's father had been talking of taking the benefit of it. This case lies near the border; and Caston, J., said of it: "The circumstances *per se* would be exceedingly weak; but in connection with the other evidence in the case, it was entitled to some regard." [11]

§ 68. 1. **In General Terms,**—the evidence while it will be kept within the rules explained in the first volume, will bend to the circumstances the same in this offense as in others. Thus,—

2. **The Defendant's Character**—may be by him put in issue as there shown; [12] but no proof of character, good or

7. Vol. II, § 1216a et seq.; Bob v. S., 32 Ala. 560; S. v. Moore (Del. 1910), 74 A. 1112.

8. S. v. Beaudet, 53 Conn. 536, 55 Am. R. 155, 4 Atl. 237; Cahill v. P., 106 Ill. 621. See S. v. Skidmore, 87 N. C. 509; S. v. Kimbrell, 151 N. C. 702, 66 S. E. 208; Esterline v. S., 105 Mo. 629, 66 A. 269.

9. Ryan v. P., 79 N. Y. 593; Moore v. S., 31 Tex. Cr. 234; S. v. Price, 111 N. C. 703, 16 S. E. 414; Hodgkins v. S., 89 Ga. 761, 15 S. E. 695; Doolittle v. S., 93 Ind. 272; P. v. Miller, 49 Mich. 23; Heiser v. Loomis, 47 Mich. 16; S. v. Montgomery, 65 Iowa, 483, 22 N. W. 639; S. v. McDonald, 14 R. I. 270; S. v. Clayton, 100 Mo. 516, 18 Am. St. 565, 13 S. W. 819; S. v. Noble, 66 Iowa, 541, 24 N. W. 34.

10. Rosenbaum v. S., 33 Ala. 354. See S. v. Goodrich, 19 Vt. 116, 47 Am. D. 676.

11. S. v. Griffis, 3 Ire. 504. Motive is sometimes relevant. P. v. Grow, 6 Cal. App. 147, 116 P. 369.

12. Vol. II, §§ 1112-1119; S. v. Cather, 121 Iowa, 106, 96 N. W. 722; S. v. Thornton, 136 N. Car.

bad, can be introduced in the first instance against him, to create a presumption of guilt.[13] Again,—

3. **Co-conspirator—Res Gestae.**—Whatever is of the *res gestae* is generally admissible,[14] so may be the declaration of co-conspirators against each other,[15] When, therefore, an assault appeared, but it was doubtful which party was the aggressor, acts and declarations of third persons tending to show a conspiracy to mob the defendant were held admissible, whether notice of them was brought home to the defendant or not.[16] And—

4. **Rule and Special Fact combining.**—The cases wherein it becomes necessary to apply general rule and special fact to each other are very numerous.[17]

§ 69. **Husband and Wife.**—we have seen in these cases, where personal violence has been inflicted by either on the other, may be witnesses for and against each other;[18] yet subject to impeachment the same as other witnesses.[19] There are intimations that this evidence is limited to the instances in which no others competent to testify were present,[20] but such is not the common doctrine. The necessity which creates an exception to the rule forbidding the matrimonial harmony to be disturbed by the parties testifying in each other's causes, "is not," said Lord Mansfield,

610, 48 S. E. 602; Balkum v. S., 115 Ala. 117, 22 So. 532, 67 Am. St. 19. Compare S. v. Thompson, 127 Iowa, 440, 103 N. W. 377.

13. Henderson v. S., 12 Tex. 525; McKenzie v. Allen, 3 Strob. 546.

14. Vol. II, §§ 1083-1087; S. v. Wilson (Kan. 1905), 80 P. 639.

15. Vol. II, § 1248 (2).

16. Tompkins v. S., 17 Ga. 356. See Harris v. S., 53 Ga. 640.

17. Yoes v. S., 4 Eng. 42; S. v. Bruce, 24 Me. 71; Tarver v. S., 43 Ala. 354; C. v. Cooley, 6 Gray, 350; P. v. Bowen, 49 Cal. 654; Smith v. S., 2 Ohio St. 511; C. v. Bean, 111 Mass. 438; S. v. Weeks, 1 Dev. 135; C. v. Lincoln, 110 Mass. 410; Robinson v. Wilson, 22 Vt. 35, 52 Am. D. 77; Richards v. S., 3 Tex. Ap. 423.

18. Vol. II, § 1153; 1 Greenl. Ev., § 343; Rex v. Azir, 1 Stra. 633; Soule's Case, 5 Greenl. 407; S. v. Boyd, 2 Hill, S. C. 288, 27 Am. D. 376; Rex v. Serjeant, Ryan & Moody, N. P. 352, 354; S. v. Neill, 6 Ala. 685; C. v. Murphy, 4 Allen, 491; Dill v. P., 19 Colo. 469, 41 Am. St. 254.

19. Memmler v. S., 75 Ga. 576.

20. S. v. Davis, 3 Brev. 3, 5 Am. D. 529.

"a general necessity, as where no other witness can be had; but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury."[21]

§ 70. **As to Chastisement.**—Where the alleged assault is by a parent on his child, a teacher on his pupil, or the like, in chastisement, it is probably the better doctrine that if the relationship appears, the chastisement will be presumed to be reasonable and for sufficient cause, until the contrary is shown. Said Caruthers, J.: "To hold a parent bound to prove that he had good cause to whip his child, or be subject to a conviction upon indictment, would be monstrous."[22] The nature of the instrument used for correction will strongly influence the question of motive or intention.[23] Non-expert evidence as to whether an injury inflicted is permanent or not is inadmissible.[24]

§ 70 a. **Court or Jury.**—Whether force used to repel a battery was appropriate in kind and degree is a question of fact for the jury; to be decided, of course, under instructions upon the law from the court.[25]

21. Bentley v. Cooke, 3 Doug. 422, 424.

22. Anderson v. S., 3 Head, 455, 457; Vanvacter v. S., 113 Ind. 276, 15 N. E. 341, 3 Am. St. 645; Marlsbury v. S., 10 Ind. Ap. 21, 37 N. E. 558; S. v. Thornton, 136 N. C. 610, 48 S. E. 602.

23. Boyd v. S., 88 Ala. 169, 7 So. 268, 16 Am. St. 31.

24. Dean v. S., 89 Ala. 46, 8 So. 38.

25. C. v. Bush, 112 Mass. 280. See Silvus v. S., 22 Ohio St. 90; Weaver v. S., 24 Ohio St. 584; P. v. Hennard, 162 Mich. 225, 127 N. W. 303, 17 Det. Leg. N. 537; S. v. Goode, 130 N. C. 651, 41 S. E. 3; Atkinson v. S., 58 Neb. 356, 78 N. W. 621.

For ASSEMBLY, UNLAWFUL, see Unlawful Assembly, New Crim. Law, II, §§ 1150, 1151, 1184, 1185, 1256-1259; Dir. & F., §§ 926-930.

CHAPTER C.

ATTEMPT.

Consult—for the law of this subject New Crim. Law, I, §§ 723-772a, and the indexes. For the form of the indictment and connected questions, Dir. & F., §§ 100-112. And see, for both law and procedure, the various substantive offenses to commit which attempts may be made. And see the indexes to these volumes and to Statutory Crimes.

§ 71. 1. **Two Elements.**—An indictable attempt consists of a specific intent to do something which constitutes a substantive crime, and an act toward but short of its completion.[26] Hence,—

2. **The Doctrine of this Chapter**—is that both these elements must be charged in the indictment; the only question is how minutely. And the proofs should cover both.

§ 72. 1. **The Obscurity of this Subject,**—explained elsewhere,[27] extends as well to the procedure as to the law. The difficulties are in the condition of the authorities, particularly as to the indictment. In principle, this subject is as plain as most others.

2. **With the Kind of Attempt**—the indictment will vary; so that—

26. New Crim. Law, I, §§ 727-730; Hicks v. C., 86 Va. 223, 226, 19 Am. St. 891, 9 S. E. 1024; Nider v. Com., 140 Ky. L. 684, 690, 131 S. W. 1024; Cates v. Com., 111 Va. 837, 69 S. E. 520; Ex parte Turner, 3 Okla. Cr. 168, 104 P. 1071; Moss v. S., 6 Ga. Ap. 524, 65 S. E. 300; S. v. Thompson, 31 Nev. 209, 101 P. 557; Flower v. Continental Casualty Co., 140 Iowa, 510, 118 N. W. 761; Ex parte Floyd, 7 Cal. Ap. 588, 95 P. 175; Scott v. P., 141 Ill. 195, 30 N. E. 329; Glover v. Com., 86 Va. 382, 385, 10 S. E. 420.

27. New Crim. Law, I, § 725.

§ 73. **How Chapter divided.**—We shall consider, I. The Indictment for Soliciting to Crime; II. For committing a Lower Crime intending a Higher; III. For Other Acts short of a Particular Substantive Crime intended; IV. The Evidence.

I. *The Indictment for Soliciting to Crime.*[28]

§ 74. 1. **Doctrine.**—When one solicits to crime another who does it, the former is ordinarily an accessory before the fact if it is felony, or a principal therein if it is misdemeanor. And the common form of indictment against the accessory before is to state the principal's guilt and add that the defendant "did maliciously and feloniously incite, move, procure, aid, and abet" him to do and commit the said felony.[29] If the person solicited declines, or fails to accomplish the thing, the solicitation becomes an attempt, and the indictment for it, whether the thing solicited is felony or msdemeanor, is in the same terms, with the omission of the averment that the person solicited committed the offense. The common expression is that at, &c., on, &c., the defendant "intending to procure and cause," &c., "did then and there solicit and incite one X to," etc.[30] The allegation may be simply that the defendant did "solicit," or that he did "incite,"—or did "solicit *and* incite,"—any one of these forms being sufficiently full.[31]

2. **Substance.**—Though commonly a solicitation is by words, their tenor need not be set out, but their substance will suffice.[32] And when is added the proper statement of the particular offense meant, the intent of the defendant

28. For the law of this sub-title, see New Crim. Law, I, §§ 767-768d, 772a; II, §§ 20, 62. "All the authorities, to which we have been referred, describe an attempt to commit a crime as consisting of three elements, to-wit: The intent to commit the crime, preference of some act towards the commission of the crime and the failure to consummate its commission." Graham v. P., 181 Ill. 477, P. 488, 55 N. E. 179, 47 L. R. A. 731.

29. Ante, § 8 (1); Dir. & F., § 116.

30. Dir. & F., § 106.

31. Vol. I, §§ 434-436.

32. Vol. II, §§ 559-563.

appears, and the indictment for the attempt is complete.[33] Thus,—

3. **For Soliciting to Larceny and Embezzlement,**—an English form, needlessly verbose, is that the defendant on, etc., at etc., "falsely, wickedly, and unlawfully did solicit and incite one X, a servant of one Y, to take, embezzle, and steal a large quantity, to wit, one hundred pounds' weight of cotton twist, of the goods and chattels of his master, the said Y." [34] The statement that the solicitation was to two offences does not make the count double; [35] but as probably in some States there cannot be both an embezzlement and a larceny of the same goods from the same owner, [36] the charge whereof would be of an impossible act, this part of the form is in such States, at least, not to be commended.[37] In like manner,—

§ 75. 1. **Soliciting to Perjury—Not testify.**—"Though," says Starkie,[38] "some of the old indictments for endeavoring to suborn state an offer of money,[39] yet it has been deemed sufficient to charge an endeavor to suborn gener-

33. Rex v. Higgins, 2 East, 5, and the other cases cited elsewhere to this subtitle; also P. v. Thompson, 37 Mich. 118; Stuckmeyer v. S., 29 Ind. 20. In S. v. Bowers, 35 S. C. 262, 266, 14 S. E. 488, 15 L. R. A. 199, sustaining an indictment for soliciting one to take a bribe holding also that the refusal of the person bribed to accept need not be alleged. See also, Stabler v. Com., 95 Pa. St. 318, 40 Am. 653.

34. Archb. Crim. Pl. & Ev. 13th Lond. Ed. 805; Ib. 19th Ed. 1025.

35. Vol. I, § 437 (3); post, § 93.

36. New Crim. Law, II, §§ 328, 329.

37. This is in substance the form held good in Rex v. Higgins, 2 East, 5. But the objection in my text—namely, that the solicitation was to an act legally impossible—was not raised; the indictment being treated as for a solicitation simply to steal, and the principal question being whether this was indictable.

Soliciting to burn—(Arson). In P. v. Bush, 4 Hill, N. Y. 133, the averment was sustained "that the defendant, on, etc., at, etc., falsely, wickedly, etc., did solicit and incite one Kinney, unlawfully, feloniously, etc., in the night-time to set fire to a certain barn of said Sheldon, situate, etc., with intent to injure said Sheldon, against the peace," etc.

38. 1 Stark. Crim. Pl., 2d Ed. 146; Browder v. Com., 136 Ky. 35, 123 S. W. 328.

39. Rex v. Margerum, Trem. P. C. 168; Rex v. Buckingham, Trem. P. C. 171, 174.

ally, without stating the means. So in an indictment for endeavoring to keep away a witness."[40] The particular perjury meant to be procured need not be stated,[41] but its materiality should be.[42] Again,—

2. **An Attempt to Bribe**—with money an officer to summon jurors nominated by the defendant, need not specify the sum offered.[43]

§ 76. 1. **For Seducing from Allegiance**—a person in the governmental service, under 37 Geo. 3, c. 70, it was in England held sufficient to allege that the defendant, at, &c., on, etc., "feloniously did maliciously and advisedly endeavor to seduce Matthew Lowe, he the said Matthew Lowe then and there being a person serving in His Majesty's forces by land, from his duty and allegiance to his said Majesty." For said Perryn, B.: "An endeavor to seduce, to entice, and to stir up, though a conclusion from an infinite variety of facts and circumstances, is but a conclusion of fact, is itself a fact, admitting of no definition or description. The fact is fully expressed by the mere force of the word 'endeavor,' and can only be expressed by that word; like the words 'conspire, maintain, aid and abet,' which, in indictments for the offenses of conspiracy, maintenance, etc., do sufficiently express the offences charged in the indictment."[44]

2. **In Short,**—the indictment for solicitation consists of the two allegations of, first, the solicitation; and, secondly, the thing solicited to. The general term, without descending to particulars, is adequate for the first; and for the

40. Fitzg. 263. See also Rex v. Plympton, 2 Ld. Raym. 1377; Watson v. S., 5 Tex. Ap. 11.

41. S. v. Holding, 1 McCord, 31.

42. S. v. Tappan, 58 N. H. 152. The accomplishment or success of a solicitation to commit perjury need not be alleged. Rivers v. S., 97 Ala. 72, 12 So. 434.

43. C. v. Chapman, 1 Va. Cas. 138. Soliciting bribery, S. v. Bowers, 35 S. C. 262, 266, 14 S. E. 488, 15 L. R. A. 199.

44. Rex v. Fuller, 1 B. & P. 180, 186, 2 Leach, 790; Winsmore v. Greenbank, Willes, 577, 583 and note.

second the indictment need not be formal and minute as where the substantive offense is charged.[45]

II. *The Indictment for committing a Lower Crime intending a Higher.*

§ 77. 1. **Statutory**—are most or all of the attempts within this sub-title. And—

2. **The Rule**—for the indictment is, that it must set out the lower offense as fully and in the same way as though it alone were complained of; and add an averment of intent to commit the higher. But the latter need be merely in terms reasonably precise, as pointed out under our last sub-title not necessarily in the minute form required in an indictment therefor.[46] Thus,—

3. **Assault intending Murder.**—Where it is a statutory crime to assault one with intent to kill him, to murder him, or the like, the indictment need only charge that the defendant, at a time and place named, "did make an assault" on him, or, in some other form of words, did what else is necessary to be alleged in an indictment for the simple offense,[47] "with intent," for illustration, "then and there feloniously, wilfully, and of his malice aforethought to kill and murder" such person.[48] not necessary to charge that the

45. Ante, § 64 (1); post, § 77 (2). In Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55, under a statute punishing one who attempts to commit a crime, and "does any act" towards its commission, a solicitation by accused to another to set fire to a room the accused had already prepared, must be alleged as an overt act in order to be relied on as a element of the crime.

46. And see ante, §§ 63a, 64 (1); Browning v. S., 2 Tex. Ap. 47; S. v. Falcolm, 8 Iowa, 413; Cokely v. S., 4 Iowa, 477; S. v. Mitchell, 139 Iowa, 455, 116 N. W. 808; S. v. Doran, 99 Me. 329, 59 A. 440, 105 Am. St. 278; P. v. Kane, 161 N. Y. 380, 389, 55 N. E. 946, 14 N. Y. Cr. 295.

47. Ante, § 56.

48. S. v. Dent, 3 Gill & J. 8; Harrison v. S., 2 Coldw. 232; Hart v. S., 38 Tex. 382; P. v. English, 30 Cal. 214; S. v. Fee, 19 Wis. 562; P. v. Swenson, 49 Cal. 388; Fulford v. S., 50 Ga. 591; Meredith v. S., 40 Tex. 480; S. v. Walker, 40 Tex. 485; Montgomery v. S., 4 Tex. Ap. 140; Stewart v. S., 4 Tex. Ap. 519; Wood v. S., 64 Miss. 761; Plake v. S., 121 Ind. 433, 16 Am. St. 408, 23 N. E. 273. And see S. v. Minau, 37 La. Ann. 526; Horton v. P., 47

assault was on "purpose," or of "malice aforethought," if these words are not in the statute.[49] Of course, if the statute requires a battery also to constitute the offense, it must be averred; otherwise it need not be.[50] But in the absence of anything special in the statute, the manner of the assault, or of the beating, or the kind of weapon,[50a] need not be stated.[51] Yet—

4. **The Name**—of the person meant to be killed should be alleged;[52] it being, for example, insufficient to say, "with intent, in so striking and beating him the said X with the club, etc., feloniously, etc., to kill and murder, etc.," where X had been mentioned only as the person assaulted.[53] Still,—

Colo. 252, 107 P. 257; McAllister v. S., 7 Ga. Ap. 541, 67 S. E. 221; Williams v. Ter., 13 Ariz. 306, 114 P. 556; Abbott v. S., 77 Ark. 337, 91 S. W. 754; S. v. Williams, 191 Mo. 205, 90 S. W. 448; Robinson v. S., 43 Fla. 175, 29 So. 625.

49. S. v. Newberry, 26 Iowa, 467; Rice v. P., 15 Mich. 9; S. v. Ostman, 147 Mo. Ap. 422, 126 S. W. 961; S. v. Harris, 209 Mo. 423, 108 S. W. 28; S. v. Kelly, 41 Ore. 20, 68 P. 1; S. v. Michel, 20 Wash. 162, 54 P. 995; S. v. Shunka, 116 Iowa, 206, 89 N. W. 977.

50. S. v. Seward, 42 Mo. 206; Miller v. S., 63 Miss. 403. And see S. v. Brown, 21 La. Ann. 347; Ainsworth v. S., 5 How. Miss. 242.

50a. Jackson v. Com., 96 Va. 107, 30 S. E. 452; In re Hughes, 159 Cal. 360, 113 P. 684; S. v. Gibson, 67 W. Va. 548, 68 S. E. 295; Stewart v. Ter., 2 Okla. Cr. 63, 100 P. 47; rehearing denied, 102 P. 649; Lindsey v. S., 53 Fla. 56, 43 So. 87; Canterbury v. S., 90 Miss. 279, 43 So. 678. Pistol used need not be alleged as loaded. McDonald v. S., 46 Fla. 149, 35 So. 72; S. v. Shunka, 116 Iowa, 206, 89 N. W. 977.

51. S. v. Sheerin, 12 Mont. 539, 33 Am. St. 600; Connors v. S., 16 Vroom, 211; Williams v. S., 47 Ind. 568; Rice v. S., 16 Ind. 298; Nash v. S., 2 Tex. Ap. 362; S. v. Chandler, 24 Mo. 371, 69 Am. D. 432; S. v. Chumley, 67 Mo. 41; Martin v. S., 40 Tex. 19; Bittick v. S., 40 Tex. 117; Mayfield v. S., 44 Tex. 59; Browning v. S., 2 Tex. Ap. 47; S. v. Shepard, 10 Iowa, 126. And see C. v. Galavan, 9 Allen, 271. There are a few cases which appear to require, contrary to the text, the particulars of the assault. Beasley v. S., 18 Ala. 535; Trexler v. S., 19 Ala. 21; S. v. Johnston, 11 Tex. 22; Wood v. S., 50 Ala. 144.

52. Ante, §§ 62, 65 (1); Jones v. S., 11 Sm. & M. 315; Brown v. S., 53 Tex. Cr. 303, 109 S. W. 188; P. v. Way, 191 Mo. 533, 84 N. E. 1117 affirming 104 N. Y. S. 277, 119 A. D. 344.

53. S. v. Patrick, 3 Wis. 812. And see post, § 82; S. v. McCunniff, 70 Iowa, 217, 30 N. W. 489.

§ 78. **More, with like Intent.**—Where the statute requires more of substantive wrong than a simple assault, or assault and battery, in addition to the ulterior intent, such excess must also be alleged.[54] And a statute may be construed to require more, though it does not in terms, according to principles stated in the first volume.[55] Thus,—

§ 79. 1. **With Knife, with Intent.**—It was held good to say that on, etc., at, etc., the defendant, "with a certain large knife which he then and there had and held at and against the body of the said X, then and there did cut, thrust, and stab, with the intent the said X then and there feloniously, wilfully, and of malice aforethought to kill and murder."[56] Also,—

2. **With Pistol, with Intent.**—The allegation was sustained that on, etc., at, etc., the defendant did make a "violent and aggravated assault with a pistol, and did then present the said pistol at said X, and did then and there shoot at said X with intent,"[57] And—

§ 80. 1. **Sufficiently in the Statutory Terms**—should be these indictments, to satisfy the rules in our first volume.[58] Thus,—

2. **Deadly Weapon, &c.**—Where a statute made punishable "every person who shall be convicted of any assault and battery upon another, by means of any deadly weapon, or by such other means or force as was likely to produce death, with intent to kill," an allegation of assault

54. S. v. Brown, 21 La. Ann. 347; Browning v. S., 2 Tex. Ap. 47; S. v. Shepard, 10 Iowa, 126; S. v. Jordan, 19 Mo. 212.

55. Vol. II, §§ 623-630.

56. S. v. Bullock, 13 Ala. 413.

57. S. v. Lutterloh, 22 Tex. 210. It is not necessary to state the manner in which the pistol was used. S. v. Croft, 15 Tex. 575. See also S. v. Cryer, 20 Ark. 64; Cronkhite v. S., 11 Ind. 307; Nixon v. P., 2 Scam. 267, 35 Am. D. 107; P. v. Urias, 12 Cal. 325; S. v. Munco, 12 La. Ann. 625; Pyke v. S., 47 Fla. 93, 36 So. 577; S. v. Steinemann, 162 Mo. 188, 62 S. W. 694; Houston v. S., 50 Fla. 90, 39 So. 468.

58. Vol. II, §§ 608-622; post, § 83; Sloan v. S., 42 Ind. 570; S. v. White, 14 Kan. 538; Baker v. P., 49 Ill. 308; Reddan v. S., 4 Greene (Iowa), 137; Williams v. S., 42 Miss. 328; Wrist v. Com., 33 Ky. L. 718, 110 S. W. 749.

and battery with the intent to kill, not adding that it was by means of a deadly weapon, or by any other such means as were likely to produce death, was held to be insufficient.[59] Again,—

3. **Malice, &c.**—Where the statutory offence was assault and battery made with express malice and with the intent to kill, the words "of his malice aforethought" were adjudged inadequate in allegation; for indictments upon statutes must state all the circumstances constituting the definition of the crime, and in the words which the statute has made technical.[60] Again,—

4. **"Intent," "Attempt," "Intention."**—Where the statute made punishable an act done "with intent to kill," an averment that it was with the "attempt," etc., was held defective; because, when the words of the statute "are descriptive of the offense, they must be used."[61] But "intention" has been accepted as a substitute for the statutory "intent."[62] In a *verdict,* assault with "attempt" was adjudged a good equivalent for assault with "intent." Said the court: "It seems impossible to doubt that the only distinction between an *intent* and an *attempt* to do a thing is that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution."[63] Since, therefore, the word "attempt" embraces the full meaning of "intent," with some-

59. P. v. Davis, N. Y. 4 Par. Cr. 61. And see Rex v. Jackson. 1 Leach, 267, 1 East P. C. 419; Rex v. Pegge, 1 East P. C. 420; S. v. Harris, 34 Mo. 347. That the instrument need not be alleged to be a deadly weapon. S. v. Keener, 225 Mo. 488, 125 S. W. 747; S. v. Laycock, 141 Mo. 274, 42 S. W. 723.

60. Anthony v. S., 13 Sm. & M. 263. See also Jennings v. S., 9 Mo. 856; S. v. Stewart, 29 Mo. 419.

61. S. v. Ross, 25 Mo. 426; S. v. Marshall, 14 Ala. 411; the judge in the latter case, adding: "To charge one with an attempt to murder is the mere charge of a legal result." And see Nugent v. S., 19 Ala. 540.

62. S. v. Tom, 2 Jones (N. C.) 414. Strictly, the decision was that if the indictment was defective from this cause, it was cured by the statute of 1811; but it seems to have been deemed good. S. v. Broussard, 107 La. 189, 31 So. 637.

63. Prince v. S., 35 Ala. 367, 369, opinion by R. W. Walker, J.

thing more, it is not impossible the courts may hereafter hold it to be an admissible substitute in an indictment.[64]

§ 81. 1. **Assault intending "Felony."**—Where the statute makes punishable an assault "with intent to commit a felony," the indictment should not simply follow the statutory words, but it must specify the particular felony intended;[65] for example,—

2. **Intending Rape.**—Under the English statute for "assault with intent to commit felony,"[66] where the intended felony was rape, the allegation is that the defendant made an assault on one named, and did beat, wound, and ill-treat her, with intent her the said, &c., violently and against her will feloniously to ravish and carnally know."[67] As to the—

§ 82. **Form of averring Intent to ravish.**—The name of the person to be ravished must appear in the allegations both of the intent to ravish and of the assault.[68] It need not be averred that she was a female,[69] or of the human species,[70] or that she was not the defendant's wife.[71] "Ravish" is the proper word,[70] but probably not indispensable where the idea is otherwise adequately conveyed.[73] Yet simply to say that the intent was to commit a rape on the person assaulted seems not to be deemed sufficient.[74]

64. Vol. II, § 612 et seq. And see Johnson v. S., 14 Ga. 55.

65. S. v. Hailstock, 2 Blackf. 257. And see Wilburn v. S., 41 Tex. 237. See S. v. Doran, 99 Me. 329, 333, 59 A. 440.

66. 9 Geo. 4, c. 31, § 25, superseded by 24 & 25 Vict. c. 100, § 38, in like words.

67. Archb. Crim. Pl. & Ev. (13th Lond. Ed.) 589.

68. Ante, § 77 (4); Nugent v. S., 19 Ala. 540.

69. Tillson v. S., 29 Kan. 452; Battle v. S., 4 Tex. Ap. 595, 30 Am. R. 169.

70. S. v. Ward, 35 Minn. 182.

71. P. v. Estrada, 53 Cal. 600; contra, Young v. Ter., 80 Okla. 525, 58 P. 724.

72. Witherby v. S., 39 Ala. 702.

73. Christian v. C., 23 Grat. 954; P. v. Brown, 47 Cal. 447.

74. S. v. Williams, 41 Tex. 98; Alexander v. S., 58 Tex. Cr. 621, 127 S. W. 189, 12 Rep. 34. Force or violence need not be alleged. High v. Ter., 12 Ariz. 146, 100 P. 448. See Westerman v. S., 53 Tex. Cr. 109, 111 S. W. 654; as to overt act, Hogan v. S., 50 Fla. 86, 39 So. 464; Robinson v. S., 118 Ga. 32, 44 S. E. 814.

Nor need the word "rape" appear.[75] The expression, "with intent to ravish and carnally know the said Margaret Bolen," not adding "against her will," or any equivalent, has been adjudged inadequate.[76] The age of the female need not be given,[77] except in some cases of carnal abuse, where age is an element in the offence.[78] And—

§ 83. **The Statutory Terms,**—where the indictment is on a statute, must be followed.[79]

§ 84. **For Assault intending Robbery,**—a form good in England is that the defendant on, etc., at, etc., "in and upon one X [then and there] being, feloniously did make an assault, with intent the moneys, goods, and chattels of the said X, from the person and against the will of him the said X, feloniously and violently to steal, take, and carry away." [80] There is room for objecting to this form that it

75. P. v. McDonald, 9 Mich. 150.

76. Mears v. C., 2 Grant (Pa.), 385. And see Hewitt v. S., 15 Tex. Ap. 80; P. v. Everett, 10 Cal. Ap. 12, 101 P. 528; "ravish and carnally know" sufficient. P. v. Horchler, 231 Ill. 566, 83 N. E. 428.

77. Bowles v. S., 7 Ohio 2d pt. 243.

78. Stat. Crimes, § 482; post, § 976. And see S. v. Ward, supra; Territory v. Keyes, 5 Dak. 244.

79. Ante, § 80; Grandison v. S., 2 Humph. 451; Elijah v. S., 2 Humph. 455; Henry v. S., 4 Humph. 270; Pleasant v. S., 13 Ark. 360; Nelson v. S., 6 Ala. 394. See C. v. Bennet, 2 Va. Cas. 235; Williams v. S., Wright, 42. As where an allegation of previous chastity may be required. Frost v. S., 94 Miss. 104, 47 So. 894. "Ravish and carnally know" is enough. Ross v. S., 16 Wyo. 285, 93 P. 299, rehearing denied, 94 P. 217. "Ravish" is surplusage in statutory rape. Ross v. S., 16 Wyo. 285, 94 P. 217. "Malice aforethought" need not be alleged. Bevers v. S., 72 Ark. 129, 78 S. W. 48. Charging that a rape was attempted is a sufficient charge of intent. P. v. Mosier, 73 Ap. Div. 5, 76 N. Y. S. 65, 16 N. Y. A. 541; Taylor v. S., 44 Tex. Cr. 153, 69 S. W. 149. A charge that defendant did assault and attempt to ravish implies that act was done by force, and force need not be alleged. Jackson v. S., 114 Ga. 861, 40 S. E. 989. Force need not be alleged in an attempt to ravish a female under age of consent. Gibbs v. P., 36 Colo. 452, 85 P. 425; S. v. Peak, 130 N. C. 711, 41 S. W. 887.

80. Archb. Crim. Pl. & Ev. 13th Lond. Ed. 357, 19th Ed. 458; Reg. v. Huxley, Car. & M. 596. See Rex v. Monteth, 2 Leach, 702; Rex v. Remnant, 2 Leach, 583, 5 T. R. 169; Rex v. Randall, 1 Leach, 267. Compare with Chitty's form, 3 Chit. Crim. Law, 808, 809. See also

is silent as to the element of putting in fear.[81] Yet probably the united words "violently" and "from the person" sufficiently supply the apparent omission.[82]

§ 85. The Thing to be taken in the Robbery—need not be described.[83]

III. *The Indictment for other Acts short of a Particular Substantive Crime intended.*

§ 86. 1. This Sub-title—embraces the ordinary common law attempts, and those under the confirmatory statutes. Most of our States have a provision that, to quote from the New York one, "every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, shall," etc.[84] These are simply the terms of the common law, and they seem to require no change from the common law indictment.

2. **The Doctrine**—is, that since in matter of law the defendant to be guilty need not have devised the steps by

Dickerson v. C., 2 Bush, 1. See, S. v. Hughes, 31 Nev. 270, 102 P. 562.

81. Post, §§ 1001, 1002. See C. v. Tanner, 5 Bush, 316.

82. New Crim. Law, II, §§ 1166-1170.

83. Conolly v. P., 3 Scam. 474, 478; Crumes v. S., 28 Tex. Ap. 516, 19 Am. St. 853; Morris v. S., 13 Tex. Ap. 65; post, § 87. Nor that a taking without consent was intended. S. v. Carroll, 214 Mo. 292, 113 S. W. 1051. Ownership need not be alleged. Traver v. S., 72 Ark. 524, 81 S. W. 615; also holding that as great particularity in charging an attempted robbery is not required as in the complete crime. Indictment need not allege person had money or property in his possession which defendant sought to take. S. v. Roberts, 67 Kan. 631, 73 P. 905. "Attempt" to take, etc., is more comprehensive than "with intent to steal." Smith v. S., 72 Neb. 345, 100 N. W. 806. See, also, as to "attempt," Adams v. S. (Tex. Cr.), 62 S. W. 1058. An assault "in a rude, insolvent and angry manner" need not be charged. S. v. Bohn, 19 Wash. 36, 52 P. 325.

84. P. v. Bush, 4 Hill, N. Y. 133; P. v. Moran, 123 N. Y. 254, 20 Am. St. 732, 25 N. E. 412; C. v. Clark, 6 Grat. 675. To the like effect, S. v. Decker, 36 Kan. 717, 14 P. 283; New Crim. Law, I, § 743.

which he would commit the substantive crime intended, and for other reasons, the indictment need not set it out with the particularization and technicalities of a charge of its actual commission;[85] but because the act done toward it must be such as the law recognizes as adequate,[86] and because accused persons are always entitled to have the particulars of the accusation stated to them,[87] such act must be specifically averred.[88] There need be no allegation that the defendant failed in his attempt.[89] It is necessary simply to set out both the intent and the act, in a way to individualize the instance, and make the combination of the two appear on the face of the allegation criminal.[90] To illustrate,—

§ 87. **In Attempted Larceny**[90a]—the things meant to be stolen were in one case described as "the goods and chattels of Thomas Roe, in the dwelling-house of the said Thomas Roe, situate in the borough of Brighton, in the county of Sussex." And the objection that the description was not sufficiently certain was overruled. "Where there is only an attempt," said Pollock, C. B., "it is not always possible to say what property the would be thief meant to steal."[91] In another case it was adjudged sufficient to say

85. Ante, §§ 64 (1), 76, 77 (2).

86. Hicks v. C., 86 Va. 223, 19 Am. St. 891, 9 S. E. 1024; S. v. Baller, 26 W. Va. 90, 53 Am. R. 66.

87. Vol. I, §§ 98a, 319 (1), 325 (2, 6), 331.

88. S. v. Colvin, 90 N. C. 717; S. v. McChesney, 16 Mo. Ap. 259; S. v. Baller, 26 W. Va. 90, 53 Am. 66; Reg. v. Sowerby, 1894, 2 Q. B. 173; Thompson v. P., 96 Ill. 158; S. v. Frazier, 53 Kan. 87, 91, 36 P. 58 (citing text.) S. v. Doran, 99 M. E. 329, 332, 59 A. 440; Hicks v. Com., 86 Va. 223, 226, 9 S. E. 1024, 19 Am. St. 891; P. v. Kane, 161 N. Y. 380, 55 N. E. 946, 14 N. Y. Cr. 295. Mere solicitations are not an attempt. There must be some act done towards perpetrating the crime which overt act must be alleged. Cox v. P., 82 Ill. 191; P. v. Young, 122 Mich. 292.

89. S. v. Decker, 36 Kan. 717, 14 P. 283.

90. See ante, §§ 71, 74, 76.

90a. There must be an overt act with an intent to steal. S. v. Hollingsworth, 1 Man. (Del.) 528, 41 A. 143; Tinker v. S., 125 Ga. 743, 54 S. E. 662; as to an attempt to commit grand larceny by procuring papers by bribing an official. P. v. Mills, 178 N. Y. 274, 67 L. R. A. 131, 70 N. E. 786.

91. Reg. v. Johnson, Leigh & C., 489, 490, 10 Cox C. C. 13. In this

"five dollars in money and other goods, chattels, and valuable things."[92] Practically the form will vary with the circumstances of the particular case.[93] But—

§ 88. The Description of the Act—of attempt, it is but repetition to state, must be specific and individualizing. The single word "attempt"—"did *attempt* feloniously to steal," etc.—does not, as the allegation should,[94] show to what class of attempts to steal the goods the individual instance belonged, the nature or extent of what was done, or anything else special to the particular accusation. Nor, even in a general way, does it make a *prima facie* case; because not all attempts tc steal, either goods in general, or specific goods, are indictable. The attempt, to be so, must be in an adequate degree proximate to the completed theft, and of a standard magnitude.[95] We have seen that a solicitation to a larceny is a punishable attempt to commit it, while yet the form of the allegation is, not that the defendant did *attempt*, etc., but did "solicit," or "incite," etc.; stating the manner in which the attempt in the individual instance was made.[96] And we have seen this to be the general rule in indictments for attempt.[97]

§ 89. Pocket picking.—Where a larceny is attempted by picking a pocket,[98] not only is the allegation inadequate

case, the act which made the attempt indictable was not set out, as it should have been; but the defendant's counsel overlooked the objection and did not take it. For the true rule, see Thompson v. P., 69 Ill. 158.

92. S. v. Hughes, 76 Mo. 323

93. Ante, §§ 76, 77, 81, 84, 85; P. v. Ah Ye, 31 Cal. 451; Reg. v. Bullock, Dears. 653, 36 Eng. L. & Eq. 608; Reg. v. Lawes, 1 Car. & K. 62; S. v. Jones, 10 Iowa, 206. It is probably necessary to state the ownership of the goods meant to be stolen, or allege a reason for not stating it. Reg. v. Marsh, 1 Den. C. C. 505, 3 Cox C. C. 570, Temp. & M. 192. And see S. v. Wilson, 30 Conn. 500.

94. Vol. I, §§ 329 (2), 331; Vol. II, §§ 506, 509, 514, 517, 519, 538, 610, 611, 623-626, 629.

95. New Crim. Law, I, §§ 727, 728, 737 et seq., 759, 764; Thompson v. P., 96 Ill. 158; Hicks v. Com., 86 Va. 223, 226, 9 S. E. 1024, 19 Am. St. 891.

96. Ante, § 74 (1). See post, § 126 (2).

97. Ante, § 86 (2); Randolph v. C., 6 S. & R. 398; S. v. Brannan, 3 Nev. 238; U. S. v. Ulrici, 3 Dil. 532.

98. New Crim. Law, I, §§ 743-745.

that the defendant "did attempt feloniously to steal" the goods of the person whose pocket it was,[99] but even the added clause, "by picking the pocket" of such person, will not render the accusation sufficiently minute and specific.[1] Yet, particularizing one degree further, it has been well held good to say that on, etc., at, etc., the defendants "wilfully and maliciously did make an assault on the person of a woman" described, "and then and there did thrust their hand into the pocket of said woman, with intent, in so doing, the moneys, goods, and chattels of said woman, if any such should then and there be found in her personal possession, feloniously to take, steal, and carry away from her person."[2] Again,—

§ 90. **An Attempted Mayhem**—was held to be insufficiently averred by the words "with a certain pistol then and there loaded with gunpowder and one leaden bullet, which" the defendant "in his right hand then and there held, then and there did attempt feloniously to maim, dis-

99. Ante, §§ 86 (2)-88.

1. S. v. Wilson, 30 Conn. 500; Randolph v. C., 6 S. & R. 398.

Attempt by false pretenses. In England it has been held adequate to charge that the defendants, by "divers false and fraudulent pretenses, unlawfully, knowingly, and designedly did attempt and endeavor feloniously to steal, take, and carry away of and from the said John Gaisford a large sum of money, to-wit: the sum of twenty pounds, of the moneys of the said John Gaisford." Reg. v. Bullock, Dears. 653, 36 Eng. L. & Eq. 608. This case appears to be contrary to the doctrine of the text. But in it, as in Reg. v. Johnson (ante, § 87), the objection now under consideration was not, I infer from the report, presented to the court. In another case it was adjudged inadequate to say that the prisoner "did unlawfully attempt and endeavor fraudulently, falsely, and unlawfully, to obtain form the Agriculturalist Cattle Insurance Company a large sum of money, to-wit, the sum of £22 10s., with intent thereby then and there to cheat and defraud" the company; because, first, the nature of the attempt was not sufficiently specified; secondly, the property in the money was not laid in any one. Reg. v. Marsh, 1 Den. C. C. 505, 3 Cox C. C. 570.

2. S. v. Wilson, supra. And for forms held good, not greatly differing from this, see C. v. Fortune, 105 Mass. 592; C. v. Bonner, 97 Mass. 587; C. v. Sherman, 105 Mass. 169; Corneille v. S., 16 Ind. 232. For other forms, perhaps better, see Dir. & F., § 612 and note.

figure, disable, and kill'' one named; for "the indictment ought to have alleged some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned."[3] Contrary to the foregoing,—

§ 91. 1. **In Alabama,**—where a statute provides that "the indictment must state the facts constituting the offense, in ordinary and concise language, in such manner as to enable a person of common understanding to know what is intended," and perhaps some other statutes modify the common law rules, the court held that the particular facts entering into the attempt need not be specified, but it suffices to say that at the time and place laid the defendant "did attempt." The reasoning appears to be that the single word "attempt" carries the double idea both of an intent and the endeavor to accomplish it,—a proposition everywhere held.[4] Hence it was adjudged sufficient to aver that the defendant "did attempt to feloniously" commit a larceny;[5] also, that the defendant "attempted to commit a rape on" a woman named.[6] The oversight of the court, for such there certainly was, consisted in not distinguishing between the charge of an endeavor in general terms and the particular endeavor, with its special facts, made in the individual instance. We have already seen, and it is but common elementary doctrine, that a defendant is entitled to have an accusation of his offense laid before him individualized,—not merely, for example, that he committed "larceny," which means that he did a wrongful act with a wrongful intent; or "murder," a word which signifies both a criminal intent and an act done toward carrying it out; but the special thing done must be put in allegation. And it was shown in the first volume that any-

3. C. v. Clark, 6 Grat. 675, 684. And see Ridenour v. S., 38 Ohio St. 272; S. v. Agee, 68 Mo. 264.

4. Ante, § 71 (1); Hicks v. C., 86 Va. 223, 19 Am. St. 891.

5. Jackson v. S., 91 Ala. 55, 24 Am. St. 860, 8 So. 773.

6. Lewis v. S., 35 Ala. 380, 390, referring to the form in the Code, also to Rex v. Fuller, 1 B. & P. 180; Lawson v. S., 20 Ala. 65, 56 Am. D. 182; Sterne v. S., 20 Ala. 43. See, also S. v. Evans, 27 Utah, 12, 73 P. 1047.

thing short of this is contrary to the constitutions in all our States.[7]

2. **In New York**—we have a *dictum* from Cowen, J., that "an attempt in any form to commit an offense is within the statute; and the particular manner in which the attempt was made need not be pointed out by the indictment."[8] But the author is not aware that there is any general departure there from the foregoing rules. And—

§ 92. **The Doctrine prevailing**—almost universally in our States requires, in attempt, the same as in all other criminal cases, the elements of the alleged wrong to be set out in the indictment; so that the court can see whether or not the law has been violated, and the defendant can know to what he must make answer.[6]

§ 93. **It is not Duplicity,**—as already seen,[9] to charge an attempt to commit more offences than one. There is but one attempt, though the object aimed at is multifarious.[10]

IV. *The Evidence.*

§ 94. 1. **Every Element**—entering into the attempt as charged must be shown with the reasonable exactness demanded in criminal evidence.[11] By the common law rules,

7. Vol. I, §§ 86, 95-112.

8. P. v. Bush, 4 Hill, N. Y. 133, 134.

6. And see, for other forms, for the attempt treated of under this sub-title, C. v. McLaughlin, 105 Mass. 460; Madden v. S., 1 Kan. 340; Cunningham v. S., 49 Miss. 685; Bassett v. S., 41 Ind. 303; Bradley v. S., 32 Ark. 704; S. v. Yarborough, 77 N. C. 524; Willey v. S., 52 Ind. 246; Collins v. S., 25 Tex. Supp. 202; P. v. Thompson, 37 Mich. 118; Collins v. S., 3 Heisk. 14; C. v. Murphy, 12 Allen, 449; Queen v. S., 5 Har. & J. 232; Stuckmyer v. S., 29 Ind. 20; S. v. Abbott, 16 N. H. 507; Fairlee v. P., 11 Ill. 1; S. v. Place, 5 Wash. 773; U. S. v. Gordon, 22 Fed. Rep. 250; S. v. Frazier, 53 Kan. 87, 42 Am. St. 274, 36 P. 58; P. v. Murray, 67 Cal. 103, 7 P. 178.

9. Vol. I, § 437 (3); ante, § 74 (3).

10. And see Rex v. Fuller, 1 B. & P. 180, 2 Leach, 790; S. v. Smith, 24 Tex. 285.

11. Vol. II, §§ 1052-1055; C. v. McLaughlin, 105 Mass. 460; Madden v. S., 58 Ga. 563; Garrity v. P., 70 Ill. 83; S. v. White, 41 Iowa, 316; Thompson v. S., 43 Tex. 583; P. v. Bishop, 81 Cal. 113, 22 P. 477; Por-

prevailing in a part of our States, if in attempted felony the actual commission of the substantive offense intended is proved, there can be no conviction for the attempt.[12] But—

2. **On an Indictment for a Substantive Offence,**— by statutes in some States, there can on a proper allegation be a conviction for the attempt; [13] in others, not.[14]

§ 95. **Attempt to kill Seducer of Wife.**—If, on an indictment against a husband for attempting to shoot the seducer of his wife, there is evidence of her want of chastity, he may rebut it by counter evidence. And if, had he killed the man, the homicide would be excusable, so is the attempt which failed.[15]

§ 96. 1. **Presumptions**—are available in the evidence of attempt.[16] Thus,—

2. **In Attempt to Murder,**—a gun levelled at one within shooting distance is presumed loaded.[17] And—

§ 97. 1. **The Probable Consequences**—of one's intentional act are, as in other criminal cases, presumed to have

ter v. S., 57 Miss. 300; Jones v. S., 13 Tex. Ap. 1; Taylor v. S., 13 Tex. Ap. 184; Barr v. P., 113 Ill. 471; Ross v. S., 62 Ala. 224.

12. New Crim. Law, I, §§ 787-789; S. v. White, 35 Mo. 500.

13. New Crim. Law, I, § 809; Hill v. S., 53 Ga. 125; Stapp v. S., 3 Tex. Ap. 138; Miller v. S., 58 Ga. 200; S. v. McLaughlin, 44 Iowa, 82; Usher v. C., 2 Duv. 394; S. v. Frank, 103 Mo. 120, 15 S. W. 330; P. v. Dartmore, 48 Hun, 321. See Sullivan v. P., 27 Hun, 35; Hutto v. S., 169 Ala. 19, 53 So. 809; Nider v. Com., 140 Ky. 684, 690, 131 S. W. 1024; Cates v. Com., 111 Va. 837, 841, 69 S. E. 520; P. v. Webb, 127 Mich. 29, 86 N. W. 406; S. v. Shepherd, 17 Conn. 54; P. v. Youngs, 122 Mich. 292, 81 N. W. 114; S. v. Archer, 54 N. H. 465, 468.

14. New Crim. Law, ut sup.; Rex v. Harmwood, 1 Russ. Crimes, 5th Eng. Ed. 870, 1 East P. C. 411; Wash. v. S., 14 Sm. & M. 120; Reg. v. Nicholls, 2 Cox C. C. 182. See Matthews v. S., 33 Tex. 102.

15. Biggs v. S., 29 Ga. 723, 76 Am. D. 630.

16. Wood v. S., 27 Tex. Ap. 393; Reg. v. Duckworth (1892), 2 Q. B. 83, 17 Cox C. C. 495; Pontius v. P., 82 N. Y. 339; Aiken v. S., 10 Tex. Ap. 610; McMahon v. S., 16 Tex. Ap. 357; Leverich v. S., 105 Ind. 277, 4 N. E. 852; Good v. S., 18 Tex. Ap. 39; S. v. Mounce, 106 Mo. 226, 17 S. W. 226; Steffy v. P., 130 Ill. 98.

17. Ante, § 66 (1); Caldwell v. S., 5 Tex. 18.

been intended.[18] But in attempt, this presumption is never of law, always only of fact; for—

2. **Intent.**—In all these cases the jury must be satisfied that in fact the defendant entertained the particular evil intent alleged against him.[19] Not necessarily by direct testimony, but in some form, this intent must be affirmatively shown in evidence.[20]

18. Vol. II, § 1100; S. v. Schloss, 93 Mo. 361.

19. New Crim. Law, I, §§ 728, 729; S. v. White, 41 Iowa, 316; Reg. v. Cox, 1 Frost. & F. 664; S. v. Jefferson, 3 Harring. (Del.) 571.

20. Vol. II, § 1101; ante, § 67; Roberts v. P., 19 Mich. 401; S. v. Neely, 74 N. C. 425, 21 Am. R. 496; Meeks v. S., 51 Ga. 429; Garrity v. P., 70 Ill. 83; P. v. Jones, 32 Cal. 80; Pratt v. S., 56 Ind. 179; P. v. Mize, 80 Cal. 41, 22 P. 80; Patterson v. S., 85 Ga. 131, 11 S. E. 620, 21 Am. St. 152; Scott v. P., 141 Ill. 195, 30 N. E. 329.

CHAPTER CI.

BARRATRY.

Consult—for the law of this offense, New Crim. Law, I, §§ 541 (1), 588; II, §§ 63-69. For the indictment, etc., Dir. & F., §§ 778, 779. And compare with the title NUISANCE.

§ 98. **The Old Form of Indictment**—for this old offense charges that on, etc. [with or without a *continuando*], at, etc., the defendant "was and yet is a common barrator;" adding the he "divers quarrels, strifes, suits, and controversies among the honest and quiet liege subjects of our lord the king then and there did move, procure, stir up, and excite;" and concluding "to the evil example, etc., and common nuisance of the liege subjects of our said lord the king, and also against the peace, etc."[21] As certainly essential in this form are—

§ 99. 1. "**Common Barrator.**"—These words, technically descriptive of the offense, cannot be dispensed with, or "supplied by words which may import as much, such as a common oppressor and disturber of the peace, or a stirer up of strife among neighbors."[22] And—

2. "**Against the Peace**"—are essential in the conclusion.[23]

§ 100. **Bill of Particulars.**—It is believed that the middle clause in the above form, which, in averring the stirring up of "divers" suits and the like, points to no one act with

21. 2 Chit. Crim. Law, 232. A little more extended, but otherwise like this, is the form in Rex. v. Spencer, Trem. P. C. 224.

22. Note to Rex v. Urlyn, 2 Saund. 308; Rex v. Hardwicke, 1 Sid. 282; Reg. v. Hannon, 6 Mod. 311; 1 Hawk. P. C. Curw. Ed., p. 475, § 9; New Crim. Law, II, § 65. Com. v. Snelling, 15 Pick (Mass.) 321; Com. v. Davis, 11 Pick (Mass.) 432; Lambert v. P., 9 Cow. (N. Y.) 575. Compare with post, § 200.

23. Palfrey's Case, Cro. Jac. 527.

the certainty required in criminal pleading, is superfluous.[24] The term "common barrator" is, contrary to the general rule in other cases, sufficiently definite.[25] But the court will order a bill or note of the particulars,[26] and limit the proofs to the instances therein set down.[27]

§ 101. **"Common Nuisance."**—This offense being a common nuisance, the question whether the conclusion "to the common nuisance," &c., is necessary,[28] is the same which is elsewhere considered.[29]

§ 102. **Acts in Proof.**—How far particular acts must be shown in proof was explained in "New Criminal Law."[30]

§ 103. 1. **Allegation of Time.**—Chitty's form avers that the offense was committed on a day named "and on divers other days and times as well before as afterwards,"[31] and the same matter appears in Tremaine.[32] We have seen that these words, here following a specific day, do not constitute *a continuando,* or any sufficient setting out of "divers other days," but the clause is mere surplusage, and one day only is alleged.[33] In the first volume the author gave his reasons for believing that in this class of offenses the pleader may, at his election, lay the wrongful acts as all done on a particular day, or as continuing; and if the

24. But see Case of Barretry, 8 Co. 36b. Compare with post, §§ 199, 200.

25. Vol. II, § 494; 1 Hawk. P. C. Curw. Ed., pp. 475, 476; Rex v. Cooper, 2 Stra. 1246; Rex v. Clayton, 2 Keb. 409; Palfrey's Case, Cro. Jac. 527; C. v. Davis, 11 Pick. 432.

26. Vol. II, § 643 et seq.; C. v. Davis, 11 Pick. 432; Rex v. Grove, 5 Mod. 18; J'Anson v. Stuart, 1 T. R. 748, 754; Rex v. Wylie, 1 New Rep. 92, 95; Com. v. Davis, 11 Pick. (Mass) 432; S. v. Chitty, 1 Bailey (S. C.) 1379.

27. Goddard v. Smith, 6 Mod. 261. But in Iveson v. Moore, 1 Ld. Raym. 486, 490, Gould, J. said that when the prosecutor has proved the particulars in his bill, "he shall be admitted to prove as many more of them as he pleases, to aggravate the fine." And see observations in Lambert v. P., 9 Cow. 578, 587; and in C. v. Pray, 13 Pick. 359, 362. And see Chambers v. S., 26 Ala. 59.

28. See Train & Heard Prec. 57, note.

29. Post, § 200, 863, 864.

30. New Crim. Law, II, § 65.

31. 2 Chit. Crim. Law, 232.

32. Rex v. Spencer, Trem. P. C. 224. So also in Parcel's Case, Cro. Eliz. 195.

33. Vol. I, §§ 388, 395.

former, the proofs will not be restricted to the one day, except in Massachusetts.[34]

2. **The Particular Vill**—within the county was never, it appears, required to be given in this offense.[35] It is certainly unimportant now, in our States.[36]

34. Vol. I, §§ 388, 392, 397, 402.

35. 2 Saund. 5th Ed. by Wms. 308, note; 1 Hawk. P. C. Curw. Ed., p. 476, § 11; Parcel's Case, supra.

36. Vol. I, § 370.

For Battery, see Assault and Battery.

CHAPTER CII.

BAWDY-HOUSE.

Consult—for the law of this offense, New Crim. Law, I, §§ 1082a-1096; and for various questions, Ib., §§ 361 (3), 500 (2), 686, 734 (2), 945, 974, 1107 (1); Stat. Crimes, §§ 21, 279. For the Indictment, etc., Dir. & F., §§ 780-787. And see the titles Disorderly House and Nuisance.

§ 104. **How Chapter divided.**—We shall consider, I. The Indictment for Keeping the House; II. The Evidence; III. The Letting of the House for Bawdry.

I. *The Indictment for Keeping the House.*

§ 105. 1. **Disorderly House.**—A bawdy-house is a species of disorderly house; so that every bawdy-house is a disorderly house, but not every disorderly house is a bawdy-house.[36a]

2. **How the Indictment.**—In reason, and on the better authorities, it is not sufficient simply to allege that the defendant, on, etc., at, etc., kept a disorderly house; the facts constituting the offense should be set out.[37] It is an approximation thereto to add that the house was unlawfully

36a. S. v. Porter, 38 Ark. 637; S. v. Boardman, 64 Me. 523; Gavin v. S., 96 Miss. 377, 50 So. 498.

37. Post, §§275, 276; Taylor v. C., 1 Duv. 160; Leary v. S., 39 Ind. 544; Mains v. S., 42 Ind. 327, 18 Am. R. 364; Jordan v. S., 60 Ga. 656; P. v. Miller, 80 N. Y. S. 1070; 81 A. D. 255, 17 N. Y. Cr. 263; S. ex rel. Etie v. Foster, 112 La. 746, 36 So. 670. Complaint against opium smoking under a statute need not allege defendants were knowingly, wilfully and wantonly present in a house where opium was found, nor need the house be alleged to be a house for smoking opium nor allege who was the keeper. Com. v. Kane, 173 Mass. 477, 53 N. E. 919.

kept for public prostitution and lewdness; and under some of our statutes, possibly also under the common law rules, such addition will render the indictment adequate.[38] But under the common law it is, at least, prudent to extend the allegation further.[39] The form of such extension should depend on the special facts. It was long ago held good to say,[40] and so is Archbold's form,[41] that at a time [42] and place named, the defendant "unlawfully did keep and maintain a certain common ill-governed and disorderly house; and in the said house, for the lucre and gain [43] of him the said [defendant], certain persons as well men as women, of evil name and fame and of dishonest conversation, then, etc., unlawfully and willingly did cause and procure to frequent and come together; and the said men and women, in the said house of him the said defendant, at unlawful times as well in the night as in the day, then &c. to be and remain drinking, tippling, whoring, and misbehaving themselves, unlawfully and wilfully did permit," etc.[44] But—

38. Clifton v. S., 53 Ga. 241; Thompson v. S., 2 Tex. Ap. 82; Brown v. S., 2 Tex. Ap. 189 (compared with Stephanes v. S., 21 Tex. 206); Killam v. S., 2 Tex. Ap. 222, 28 Am. R. 432; Brooks v. S., 4 Tex. Ap. 567; Bigby v. S., 5 Tex. Ap. 101. And see S. v. Alderman, 40 Iowa, 375; S. v. Beebe, 115 Iowa, 128, 130, 88 N. W. 358.

39. And see Greensburgh v. Corwin, 58 Ind. 518.

40. Rex v. Higginson, 2 Bur. 1232; post, § 273.

41. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 638, 19th Ed. 960.

42. As to the allegation of time, see ante, § 103 (1) and places there referred to; Lowe v. S., 4 Tex. Ap. 34; S. v. Reckards, 21 Minn. 47; Freeman v. S., 119 Ind. 501; Lismore v. S., 94 Ark. 207, 126 S. W. 853.

43. Not necessary. Post, § 108.

44. **Conclusion.** As to the proper conclusion, see ante, §§ 98, 99 (2); post, §§ 862-864. **For Other Forms**—see Dir. & F., §§ 780-787; C. v. Shea, 150 Mass. 314, 23 N. E. 47; S. v. McGregor, 41 N. H. 407; C. v. Hart, 10 Gray, 465; Reg. v. Barrett, Leigh & C. 263; S. v. Odell, 42 Iowa, 75; Lowe v. S., supra; S. v. Nichols, 83 Ind. 228, 43 Am. R. 66; C. v. Lavonsair, 132 Mass. 1; S. v. Holmes, 56 Iowa, 588, 41 Am. R. 121; S. v. Towler, 13 R. I. 661; S. v. Brown, 7 Wash. 10; S. v. Osgood, 85 Me. 288, 27 A. 154. **For Frequenting Bawdy-Houses,**—there is a good indictment in Fahnestock v. S., 102 Ind. 156. And see Raymond v. P. 9 Bradw. 344.

§ 106. 1. **"Disorderly"—"Bawdy."**—The allegation that the house was "disorderly" is unnecessary, it being sufficient to say "a certain common bawdy-house."[45] Or,—

2. **Combination of Forms—(Duplicity).**—As a house may be disorderly by reason of its use for bawdry,[46] or for common tippling, or for common gaming, or for disturbances of the neighborhood through quarrelling and loud noises; so, *a fortiori,* it may become so by combining any two or more of these evil uses. The indictment, therefore, may charge, in a single count, any or all of these various forms of the offense conjunctively, and will not be double, and will be sustained by proof of any one of the uses.[47]

§ 107. 1. **Names—Instances.**—"It is not necessary," says Chitty,[48] "to state particulars; as, the names of those who frequent the house.[49] But evidence of particular instances of illicit intercourse may be given under the general charge."[50] And—

2. **"Divers Persons."**—Under a statute forbidding any one to "keep a house of ill-fame, resorted to for the purpose of prositution or lewdness," it is sufficient to aver that the defendant unlawfully kept and maintained a house of ill-fame, resorted to for the purpose of prostitution and

45. 2 Chit. Crim. Law, 39 and note; S. v. Alderman, 40 Iowa, 375; Clifton v. S., 53 Ga. 241.

46. New Crim. Law, I, § 1083; Gavin v. S., 96 Miss. 377, 50 So. 498. "Feloniously" is unneccessary, S. v. Beebe, 115 Iowa, 128, 88 N. W. 358.

47. Vol. I, § 434; P. v. Carey (N. Y.) 4 Par. Cr. 238; C. v. Kimball, 7 Gray, 328; C. v. Donovan, 16 Gray, 18. And see C. v. Howe, 13 Gray, 26; S. v. Hanchett, 38 Conn. 35, 38; C. v. Ballou, 124 Mass. 26; Tompkins v. S., 4 Tex. Ap. 161; Wooster v. S., 55 Ala. 217; S. v. Keithley, 142 Mo. Ap. 417, 127 S. W. 406.

48. 2 Chit. Crim. Law, 39 and note.

49. Rex v. Higginson, 2 Bur. 1232; J'Anson v. Stuart, 1 T. R. 748, 752, 754; post § 276; S. v. Beebe, 115 Ia. 128, 88 N. W. 358; S. v. Raymond, 86 Mo. Ap. 537; S. v. Feuerhaken, 96 Iowa, 299, 65 N. W. 299; S. v. Patterson, 29 N. C. 70, 45 Am. D. 506; Com. v. Ashley, 2 Gray (Mass.), 356.

50. Clark v. Periam, 2 Atk. 337, 339; S. v. Patterson, 29 N. C. 70, 45 Am. D. 506.

lewdness, without adding "by divers persons, men as well as women."[51] Again,—

§ 108. 1. **"For Lucre"**—is needless in allegation.[52]

2. **Indorsement.**—An indictment for this offense need not, in Missouri, be indorsed[53] with the prosecutor's name.[54]

§ 109. **Wife—(Keeping).**—The wife may be indicted jointly with the husband, or alone.[55] "The keeping is not to be understood of having or renting, in point of property; for in that sense the wife cannot keep it. But the keeping here is the governing and managing a house in such a disorderly manner as to be a nuisance, and the wife may have a share in the management or government of a disorderly house as well as the husband."[56]

§ 110. **Separaliter.**—This is among the offenses to which the doctrine of joining defendants and transactions "separaliter," as explained in the first volume,[57] applies,[58]—a method practically objectionable.

§ 111. **Minor Locality within County.**—By some of the books, in the words of a learned judge, this offense "must be described as committed in a particular town; and the prosecutor is confined in his proofs to the town, and cannot, as in other cases, prove an offense within the county: a more particular description of the house is not required."[59] In one book it is very properly stated that "when the house is described as being *situated* in a partic-

51. C. v. Ashley, 2 Gray, 356; S. v. Homer, 40 Me. 438; Brooks v. S., 4 Tex. Ap. 567.

52. New Crim. Law, I, § 1086; C. v. Ashley, 2 Gray, 356; C. v. Wood, 97 Mass. 225, 229; S. v. Homer, 40 Me. 438; S. v. Lee, 80 Iowa, 75, 20 Am. St. 401. See S. v. Parks, 61 N. J. L. 438, 39 A. 1023.

53. Vol. II, § 690 et seq.

54. S. v. Bean, 21 Mo. 267.

55. New Crim. Law, I, §§ 361, 363, 366, 1084.

56. Reg. v. Williams, 1 Salk. 384. And see S. v. McGregor, 41 N. H. 407; as to "keeping" and "letting," S. v. Vette, 179 Mo. 408, 78 S. W. 1133.

57. Vol. II, §§ 473-475.

58. 2 Hale P. C. 174; S. v. McDowell, Dudley, S. C. 346.

59. Williams, C. J. in S. v. Nixon, 18 Vt. 70, 76, 46 Am. D. 135; Archb. Crim. Pl. & Ev. (13th Lond. Ed.) 749.

ular parish, this, being matter of description, must be proved as laid;"[60] because otherwise there will be a variance.[61] And if, to abate a nuisance, a house is to be torn down by order from the court, the indictment must aver its particular location;[62] but no such judgment is given or asked in this class of nuisances.[63] The true doctrine, certainly in principle, therefore, is that neither in allegation nor in the proofs need the minor locality within the county appear, the ordinary rules applying to this offense the same as to most others.[64]

II. *The Evidence.*

§ 112. 1. **No One Class of Proofs**—is required in these cases, to the exclusion of others legitimately tending to establish the issue. Some forms of the evidence are,—

2. **Reputation of Frequenters.**—A bawdy-house being indictable because corrupting to the public morals,[65] evidence is admissible that it is frequented by reputed strumpets and rakes; for by the characters of such frequenters its business is advertised, and the intent of the keeper is evinced. Moreover, the fair presumption is that the com-

60. Roscoe Crim. Ev. (3d Ed.) 796.

61. Vol. I, § 371; Vol. II, §§ 485, 486.

62. Vol. I, § 372.

63. New Crim. Law, I, § 828; Ely v. Niagara, 36 N. Y. 297; Brooks v. S., 4 Tex. Ap. 567.

64. Vol. I, § 370; Lowe v. S., 4 Tex. Ap. 34; Handy v. S., 63 Miss. 207, 56 Am. R. 803; Sparks v. S., 59 Ala. 82, 86. And see P. v. Saunders, 29 Mich. 269; Meadows v. Com., 31 Ky. L. 1159, 104 S. W. 954; Sprague v. S. (Tex. Cr. Ap. 1898), 44 S. W. 837.

65. New Crim. Law, I, §§ 500 (2), 734 (2), 1083; Shaffer v. S., 87 Md. 124, 39 A. 313; Graeter v. S., 105 Ind. 271, 4 N. E. 461; S. v. Mack, 6 So. 808, 41 La. Ann. 1079; Com. v. Gannett, 1 Allen (Mass.), 7, 79 Am. Dec. 698; S. v. Price, 115 Mo. Ap. 656, 92 S. W. 174; Bindernagle v. S., 60 N. J. L. 607, 37 A. 619, affirmed in 38 A. 973, 39 A. 36, 41 A. 109, 61 N. J. L. 259; S. v. Cambron, 20 S. D. 282, 105 N. W. 241; Lismore v. S., 94 Ark. 207, 126 S. W. 853. The majority of the cases hold that the reputation of the defendant for chastity may be inquired into. S. v. Beebe, 115 Iowa, 128, 131, 88 N. W. 358; S. v. Brunell, 29 Wis. 435; P. v. Saunders, 29 Mich. 269; Betts v. S., 93 Ind. 375; contra, S. v. Hull, 18 R. I. 207, 26 A. 191, 20 L. R. A. 609.

ing together of such persons, male and female, where opportunities are provided, is for bawdry, and that their conduct there corresponds with the object of their coming.[66] And though reputation pertains in a certain sense to hearsay,[67] it is still proper evidence of character.[68]

§ 113. **Reputation of House.**—Some carry this doctrine a step further, and accept the reputation of the house for bawdry as competent evidence, *prima facie,* that it is a bawdy-house [69] at least, as tending to prove it such, yet not that the defendant is the keeper.[70] Others, and probably the majority, reject this evidence, in accordance with the humane principle that a man shall not be condemned for what his neighbors say of him.[71] Other proofs will

66. Post, § 116; S. v. McDowell, Dudley, S. C. 346, 349; C. v. Cardoze, 119 Mass. 210; McCain v. S., 57 Ga. 390; U. S. v. Stevens, 4 Cranch C. C. 341; S. v. Hand, 7 Iowa, 411, 71 Am. D. 453; S. v. Lyon, 39 Iowa, 379; Sylvester v. S., 42 Tex. 496; S. v. Boardman, 64 Me. 523; S. v. Brunnell, 29 Wis. 435; O'Brien v. P., 28 Mich. 213; Harwood v. P., 26 N. Y. 190, 84 Am. D. 175; Beard v. S., 71 Md. 275, 17 Am. St. 536, 170 A. 1044; S. v. Schaffer, 74 Iowa, 704, 39 N. W. 89; Sparks v. S., 59 Ala. 82; Johnson v. S., 32 Tex. Cr. 504, 24 S. W. 411; Shaffer v. S., 87 Md. 124, 39 A. 313; Wimberly v. S., 53 Tex. Cr. Ap. 11, 108 S. W. 384.

67. Vol. II, § 1081.

68. Vol. II, § 1117; 1 Greenl. Ev. § 55; Clementine v. S., 14 Mo. 112; C. v. Kimball, 7 Gray, 328; C. v. Gannett, 1 Allen, 7, 79 Am. D. 693; S. v. McDowell, supra; S. v. Beebe, 115 Ia. 128, 131, 88 N. W. 358.

69. S. v. McDowell, Dudley, S. C. 346, 349; Territory v. Chartrand, 1 Dak. 379; Lismore v. S., 94 Ark. 207, 126 S. W. 853; Com. v. Serves, 17 Pa. Sup. Ct. 407; Sprague v. S. (Tex. Cr. Ap. 1898). 44 S. W. 837; Territory v. Stone, 2 Dak. 155, 161; King v. S., 17 Fla. 183; Hogan v. S., 76 Ga. 82; S. v. Lee, 80 Iowa, 75, 20 Am. St. 401, 45 N. W. 545; S. v. Mack, 41 La. Ann. 1079, 6 So. 808; S. v. Smith, 29 Minn. 193; S. v. West, 46 La. Ann. 1009, 15 So. 418. See O'Brien v. P., 28 Mich. 213, 783-2. See also Howard v. P., 27 Colo. 396, 61 P. 595; Com. v. Murr, 7 Pa. Super. 391; S. v. Wilson, 124 Iowa, 264, 99 N. W. 1060; P. v. Wheeler, 105 N. W. 607, 142 Mich. 212; Nelson v. Ter., 5 Okla. 512, 49 P. 920; S. v. Cambron, 20 S. D. 282, 105 N. W. 241; Rollins v. S., 60 Tex. Ev. 523, 132 S. W. 770; S. v. Ballew, 26 S. D. 494, 128 N. W. 716.

70. Allen v. S., 15 Tex. Ap. 320.

71. S. v. Boardman, 64 Me. 523; S. v. Lyon, 39 Iowa, 379; C. v. Stewart, 1 S. & R. 342; P. v. Mauch, 24 How. Pr. 276; Henson v. S., 62 Md. 231, 50 Am. R. 204; Sparks v. S., 59 Ala. 82. See S. v. Brunell, 29 Wis. 435. And see New Crim. Law, I, § 1088.

supply the place of evil reputation.[72] But—

§ 114. **Reputation of House under Statutes.**—The statutes in some of our States are construed as making the offense itself consist, partly or altogether, in the evil reputation of the house. Then the reputation not only may, but must, be proved.[73]

§ 115. **Specific Acts**—of bawdry in the house need not be shown;[74] though admissible, with other proofs.[75] Alone they are not enough.[76]

§ 116. 1. **The Usual Evidence**—is "that notoriously reputed prostitutes and libertines were in the habit of frequenting the house during the time laid in the indictment;[77] and (where it can be shown) that actual lewd behavior took place therein,[78] together with the disturbance it created, if any, to the peace. good order, and consequent enjoyment of the neighborhood.[79] Yet—

72. S. v. Lee, supra.

73. New Crim. Law, I, § 1088; Cadwell v. S., 17 Conn. 467; S. v. Brunell, 29 Wis. 435; Carroll v. S., 4 Okla. Cr. 242, 111 P. 1021; S. v. McGinnis, 56 Ore. 163, 108 P. 132; S. v. Anderson, 83 Conn. 55, 75 A. 81 (such statute is not unconstitutional). See S. v. Morgan, 40 Conn. 44; S. v. Hand, 7 Iowa, 411, 71 Am. D. 453. It has been held that evidence of the bad reputation of the house prior to the statute going into effect is admissible in aid of the proofs of its subsequent character. Cadwell v. S., supra.

74. S. v. Brunell, 29 Wis. 435, 438; Drake v. S., 14 Neb. 535, 17 N. W. 117; Territory v. Chartrand, 1 Dak. 379; Betts v. S., 93 Ind. 375.

75. Ante, § 107 (1); O'Brien v. P., 28 Mich. 213; McCain v. S., 57 Ga. 390; C. v. Cardoze, 119 Mass. 210; C. v. Stewart, 1 S. & R. 342; S. v. Garing, 75 Me. 591; S. v. Smith, 29 Minn. 193. And see S. v. Foley, 45 N. H. 466; U. S. v. Jourdine, 4 Cranch C. C. 338; U. S. v. Nailor, 4 Cranch C. C. 372; Mahalovitch v. S., 54 Ga. 217.

76. P. v. Gastro, 75 Mich. 127, 42 N. W. 237; S. v. Calley, 104 N. C. 858, 17 Am. St. 704; S. v. Webber, 107 N. C. 962, 22 Am. St. 920; Singleton v. Ellison, 1895, 1 Q. B. 607; Smalley v. S., 11 Tex. Ap. 147.

77. Fowler, J. in S. v. McGregor, 41 N. H. 407, 413; Greig v. Bendeno, Ellis, B. & E. 133; C. v. Gannett, 1 Allen, 7, 79 Am. D. 693; ante, § 112 (2).

78. Ante, § 115; Clementine v. S., 14 Mo. 112; S. v. Steen, 125 Iowa, 307, 101 N. W. 96; S. v. Price, 115 Mo. Ap. 656, 92 S. W. 174.

79. Clementine v. S., supra; C. v. Stewart, 1 S. & R. 342.

2. **That the Neighborhood was not Disturbed**—is not a sufficient defense to a *prima facie* case.[80] And—

3. **Conversations of Men**—after coming out of the house, not in the presence of the keeper, are inadmissible; being hearsay.[81] But—

4. **Conversations of Women**—stopping at the house may be evidence of their character, though not had in the defendant's presence.[82]

§ 117. 1. **Frequent Arrests,**—in the house, of known prostitutes, or of women convicted of prostitution, and attendant circumstances, are evidence that it is a bawdy-house.[83] So,—

2. **Procuring Women,**—by the defendant to come and live in the house, was with other facts held admissible.[84] Even—

3. **Refusal to Testify**—to the conduct of the inmates and visitors, by witnesses who have frequented the house, on the ground that thereby they would degrade themselves, has been deemed proper for consideration by the jury.[85]

§ 118. 1. **Keeping the House**—does not require ownership, even such as is created by a lease and occupancy;[86] but by such control over it and its inmates as pertains to the head of a household.[87] This part of the case is not

80. New Crim. Law, I, § 1087; C. v. Gannett, supra; Barnesciotta v. P., 10 Hun, 137; P. v. Rowland, 1 Wheeler Crim. Cas. 286.

81. C. v. Harwood, 4 Gray, 41, 64 Am. D. 49. See C. v. Sliney, 126 Mass. 49; S. v. Lee, 80 Iowa, 75, 20 Am. St. 401, 45 N. W. 545; S. v. Sweet, 81 N. J. 250, 79 A. 1054.

82. S. v. Toombs, 79 Iowa, 741, 45 N. W. 300; Hickman v. S., 59 Tex. Cr. 88, 126 S. W. 1149.

83. Harwood v. P., 26 N. Y. 190, 84 Am. D. 175; P. v. Wright 95 Mich. 362, 51 N. W. 517.

84. S. v. McGregor, 41 N. H. 407. See Sullivan v. S., 75 Wis. 650. Age of inmate; how proved, Mash v. P., 220 Ill. 86, 77 N. E. 92.

85. Clementine v. S., 14 Mo. 112.

86. New Crim. Law, I, § 1084; ante, § 109. See P. v. Townsend, 3 Hill, N. Y. 479.

87. New Crim. Law, I, §§ 1084, 1085, 1095, 1096; S. v. Wells, 46 Iowa, 662, 665; Stratton v. S. (Tex. Cr. Ap. 1898), 44 S. W. 506; S. v. Emblem, 66 W. Va. 360, 66 S. E. 499.

provable by general reputation.[88] A prostitute merely occupying a room is not the keeper.[89] And one may become keeper in law by aiding the keeper in fact.[90] Moreover, one who holds himself out as keeper is presumed to be such.[91]

2. **Bawdry in a House,**—without the knowledge or acquiescence of its keeper, would not subject him to punishment.[92] Hence such evidence as that he bailed,[93] or secreted [94] persons arrested therein, that the prostitution was open and notorious, and the like,[95] is pertinent.

III. *The Letting of the House for Bawdry.*[96]

§ 119. **Indicting as Keeper.**—One who lets a house for bawdry is on principle, and by the better American authorities, indictable as keeper when it is so used.[97] But because this is sometimes denied,[98] and for other reasons, it may be practically better to draw the indictment on the—

§ 120. **Special Facts.**—For this offense, as for most others, the pleader may at his election draw the indictment on the special facts.[99] And perhaps he must under some of the statutes.[1] There should be a proper averment of the

88. Burton v. S., 16 Tex. Ap. 156; King v. S., 17 Fla. 183

89. New Crim. Law, I, § 1085; Moore v. S., 4 Tex. Ap. 127.

90. Clifton v. S., 53 Ga. 241. See New Crim. Law, I, §§ 1090-1096.

91. S. v. Hand, 7 Iowa, 411, 71 Am. D. 453; Bindernagle v. S., 61 N. J. L. 259, 38 A. 973.

92. McCain v. S., 57 Ga. 390; P. v. Miller, 80 N. Y. S. 1070, 81 A. D. 255.

93. Harwood v. P., 26 N. Y. 190, 84 Am. D. 175.

94. Maholovitch v. S., 54 Ga. 217.

95. S. v. Wells, 46 Iowa, 662; Johnson v. S., 32 Tex. Cr. 504, 505, 24 S. W. 411.

96. For the law of this sub-title, see New Crim. Law, I, § 1090-1096. For forms of the indictment, see Dir. & F., § 785, 786.

97. Ib.; P. v. Erwin, 4 Denio, 129; Lowenstein v. P., 54 Barb. 299; S. v. Lewis, 5 Mo. Ap. 465; Harlow v. C., 11 Bush, 610; Troutman, v. S., 20 Vroom, 33. See S. v. Pearsall, 43 Iowa, 630.

98. New Crim. Law, I, § 1095; C. v. Johnson, 4 Pa. Law Jour. Rep. 398. See Graeter v. S., 105 Ind. 271, 4 N. E. 461.

99. C. v. Harrington, 3 Pick. 26.

1. Crofton v. S., 25 Ohio St. 249.

time of making the contract of letting;[2] but unless stated descriptively, it need not be proved as laid.[3] The name of the lessee should be given, or a reason for its omission.[4] And the facts of the offense should be set out, yet not necessarily with the day when the lease was to begin or end.[5]

§ 121. **Evidence—(Knowledge).**—Knowledge by the lessor of the unlawful use intended must appear;[6] as, for example, by evidence that the lessee was of evil repute, or the like.[7] And in all respects the full offense as defined by law must be shown.[8]

§ 122. **The Allied Titles,**—especially Disorderly House and Nuisance, and the Chapter in "New Criminal Law," should be consulted in connection with this chapter.

2. C. v. Moore, 11 Cush. 600.

3. C. v. Harrington, 3 Pick. 26. See post, §§ 161, 260.

4. C. v. Moore, supra.

5. Smith v. S., 6 Gill, 425. See this case also for a form of the indictment. See likewise S. v. Abrahams, 6 Iowa, 117, 71 Am. D. 399; Harlow v. C., 11 Bush, 610. And as to the Tennessee doctrine, S. v. Wheatley, 4 Lea, 230.

6. S. v. Leach, 50 Mo. 535.

7. P. v. Saunders, 29 Mich. 269.

8. Abrahams v. S., 4 Iowa, 541, under § 2742 of the Code.

For Bestiality, see Sodomy; Betting, see Stat. Crimes; Bigamy, see Stat. Crimes.

CHAPTER CIII.

BLASPHEMY AND PROFANENESS.

Consult—for the law of these offenses, New Crim. Law, I, § 498; II, §§ 73-84, 910, 946 (2). For the indictment and the like, Dir. & F., §§ 240-244. And see Vol. II, § 557 (2).

§ 123. 1. **The Gist of these Offenses,**—considered apart from the intent, consists, at the common law and ordinarily under the statutes, of words either oral or written.[9] Yet perhaps there may be a pantomime, picture, or image, indictable on the ground that it is blasphemous.[10] Hence, in any one of these cases, the indictment for blasphemous and profane words is drawn on the same familiar pattern with the indictment and declaration for oral and written slander and libel.[11] Thus,—

2. **In Hearing.**—Profanity is not duly charged simply as uttered in a public street, it must be as in the hearing of divers persons.[12]

3. **In a Public Place also**—must the words be laid as uttered, at least under some of the statutes; [12a] or probably at common law the circumstances under which they are

9. New Crim. Law, II, § 76 (1). And see §§ 79, 80. The use of word "damn" not being used with the name of Deity is profanity. S. v. Wiley, 76 Miss. 282, 24 So. 194, 71 Am. St. 531.

10. Post, §§ 795, 796.

11. See, for example, form in 2 Chit. Crim. Law, 13; Dir. & F., § 242.

12. S. v. Pepper, 68 N. C. 259, 12 Am. R. 637; S. v. Barham, 79 N. C. 646; C. v. Linn, 158 Pa. 22, 27 A. 843. Compare with Ware v. Cartledge, 24 Ala. 622, 60 Am. D. 489; Burton v. Burton, 3 Greene (Iowa), 316; Hurd v. Moore, 2 Ore. 85; Brown v. Brashier, 2 Pa. (P. & W.) 114; Bradshaw v. Perdue, 12 Ga. 510; Burbank v. Horn, 39 Me. 233. And see S. v. Steele, 3 Heisk. 135; S. v. Chandler, 2 Har. (Del.) 553; Holcomb v. Carnish, 8 Conn. 375; Garee v. S., 71 Ala. 7.

12a. Indictment must state the particular public place. S. v. Shanks, 88 Miss. 410, 40 S. 1005.

charged to have been delivered must be such as will enable the court to see that they were a nuisance.[13]

4. **All the Words**—need not be set out, but only so many connected ones as constitute an offense.[14]

5. **Tenor.**—The words, whether oral or written, should be averred by their tenor, not simply their substance.[15] But—

6. **There are Statutes**—under which the tenor is deemed not necessary.[16]

§ 124. In General.—Seeing that under other titles the principles which regulate this proceeding are stated, further particulars are not required here. In practice, most indictments for this offense will be drawn upon statutes. And the practitioner will have no difficulty in conducting the proceedings in conformity to the law of his own State.[17]

13. Dir. & F., §§ 241-243; C. v. Linn. 158 Pa. 22, 27 A. 843; Goree v. S., 71 Ala. 7, 9; Walton v. S., 64 Miss. 207. Language need not be used in public. Bodenhamer v. S., 60 Ark. 10, 28 S. W. 507. Words of imprecation or implying divine condemnation, if so used as to be a public nuisance, are profane though name of God is not used. Gaines v. E., 7 Lea. (Tenn.) 410, 40 Am. 64.

14. Post, § 791; S. v. Steele, supra; S. v. Freeman, 63 Vt. 496, 22 A. 621; Ex parte Foley, 62 Cal. 508. Compare with Rutherford v. Evans, 6 Bing. 451, 4 Moore & P. 163; Tabart v. Tipper, 1 Camp. 350, 352.

15. Vol. II, §§ 559-563; post, § 789; S. v. Barham, 79 N. C. 646; Rex. v. Sparling, 1 Stra. 497; Rex v. Popplewell, 1 Stra. 686; Rex v. Chaveney, 2 Ld. Raym. 1363; Walton v. S., 64 Miss. 207, 8 So. 171. Compare with Taylor v. Moran, 4 Met. (Ky.) 127; Watson v. Musick, 2 Mo. 29; Parsons v. Bellows, 6 N. H. 289, 25 Am. D. 461; Bassett v. Spofford, 11 N. H. 127; Zeig v. Ort, 3 Chand. 26; Young v. S., 10 Lea, 165; S. v. Parker, 39 Mo. Ap. 119.

16. S. v. Warren, 113 N. C. 683, 18 S. E. 498; Ex partè Foley, 62 Cal. 508. See C. v. Spratt, 14 Philad. 365. Under the statutes an allegation that accused did "profanely curse and swear," Bodenhamer v. S., 60 Ark. 10, 28 S. W. 507; Odell v. Garnett, 4 Blackf. 549; Fancy v. S., 9 Ind. Ap. 46, 36 N. E. 295; or used "profane oaths," Johnson v. Barclay, 16 N. J. L. 1; or spoke profanely, Com. v. Spratt, 14 Phila. (Pa.) 365, is enough.

17. See also Johnson v. Barclay, 1 Harrison, 1; C. v. Kneeland, 20 Pick. 206; S. v. Kirby, 1 Murph. 254; S. v. Jones, 9 Ire. 38.

§ 125. **Confessions**—have been deemed insufficient in proof of these offenses, unless accompanied by other evidence of the *corpus delicti.* "If any person heard the words spoken, his testimony should be adduced. If they were not heard by any person, no crime could have been committed, and the prisoner might as well be convicted if he had merely confessed he once thought so."[18]

18. P. v. Porter, 2 Par. Cr. (N. Y.) 14. See Vol. II, § 1058.

CHAPTER CIV.

BRIBERY.

Consult—for the law of this offense, New Crim. Law, I, §§ 246 (2), 468 (3), 471, 974; II, §§ 84a-89; Stat. Crimes, §§ 803, 818, 843. For the indictment, etc., Dir. & F., §§ 245-250.

§ 126. 1. **The Indictment for the Substantive Bribery**—at common law sets out of the facts which render the giving or taking of the bribe punishable, including the official character of one of the parties thereto, the act of giving it or taking it, or both, and of what it consisted, with time and place, and proper introductory and concluding averments.[19]

2. **For the Attempt to Bribe,**—which is the more common form of the offense,[20] it will not suffice simply to allege that on, etc., at, etc., the defendant "did attempt" to bribe an officer named, but the particulars should be stated.[21] And for this the better common law form, not saying that no other will suffice, is ordinarily to draw the indictment precisely as for the substantive offense, employing such words as "offer," "solicit," and the like, in the place of words like "give" and "accept."[22]

§ 127. **On a Statute**—the indictment will in most in-

19. And see forms 3 Chit. Crim. Law, §§ 684-698; Rex v. Smith, 20 How. St. Tr. 1225, 1227. See also Glover v. S., 109 Ind. 391, 10 N. E. 282; P. v. McQuade, 110 N. Y. 284, 21 N. W. 455; Guthrie v. S., 16 Neb. 667, 18 N. E. 156. The money need not be described but, if it is, the kind of money as alleged must be proved, Value v. S., 84 Ark. 285, 105 S. W. 861.

20. New Crim. Law, II, §§ 88, 89.

21. Ante, §§ 74, 88.

22. For forms see Dir. & F., § 247; Chit. ut sup; Archb. Crim. Pl. & Ev. (19th Ed.) 890. And see S. v. Smalls, 11 S. C. 262; S. v. Lusk, 16 W. Va. 767. Indictment charging offer to bribe a judge not defective because failing to allege prosecution pending, Tillman v. S., 58 Fla. 113, 50 So. 675.

stances be drawn; then the general rules for statutory indictments will serve as sufficient guides.[23]

§ 127 a. **The Corrupt intent**—of the person receiving a bribe need not be proved on the trial of the person bribed,[1] the intent to influence official action may be inferred either from the giving of the money itself or from the language of the accused. The accused may show that he was intoxicated, to rebut the inference of an intent to bribe.[2]

§ 127 b. **Judicial notice**—of the character and of the acts of the public officer who was bribed,[3] of the date of

23. Vol. II, § 593 et seq. And see, in bribery cases, S. v. Biebusch, 32 Mo. 276; Collins v. S., 25 Tex. Supp. 202; S. v. Walls, 54 Ind. 561; S. v. Hughes, 43 Tex. 518; Reed v. S., 43 Tex. 319; C. v. Stephenson, 3 Met. (Ky.) 226; S. v. Pearce, 14 Fla. 153; Old v. C., 18 Grat. 915; P. v. Squires, 99 Cal. 327, 33 P. 1092; Florez v. S., 11 Tex. Ap. 102; S. v. Baller, 26 W. Va. 90, 53 Am. R. 66; Jackson v. S., 43 Tex. 421; S. v. Potts, 78 Iowa, 656, 43 N. W. 534; Watson v. S., 39 Ohio St. 123; Brown v. S., 13 Tex. Ap. 358; Shircliff v. S., 96 Ind. 369; S. v. Stephenson, 83 Ind. 246; Leeper v. S., 29 Tex. Ap. 154; S. v. Taylor, 44 La. Ann. 967, 11 So. 576; Ex parte Bunkers, 1 Cal. Ap. 61, 81 P. 748; Com. v. Donovan, 170 Mass. 228, 49 N. E. 104; P. v. Jackson, 95 N. Y. S. 286, 47 Misc. 60; P. v. Jackson, 106 N. Y. S. 1046; P. v. Furlong, 125 N. Y. S. 164, 140 A. D. 179; Amundson v. S., 28 Ohio Cir. Ct. 655; Schultz v. S., 133 Wis. 215, 113 N. W. 428; Sharp v. U. S., 71 C. C. A. 258, 138 F. 878. That the person bribed was a juror and the thing offered with its value must be alleged, S. v. Howard, 66 Minn. 309, 68 N. W. 1096. So other crimes may be shown, P. v. Furlong, 201 N. Y. 511, 94 N. E. 1096, affirming 125 N. Y. S. 164, 140 A. D. 179. As to bribery of agent of union, P. v. Rock, 125 N. Y. S. 301. Coroner is a "judicial officer," P. v. Jackson, 191 N. Y. 293, 84 N. E. 65. Corrupt intention must be proved beyond reasonable doubt, S. v. Pritchard, 107 N. C. 921, 926, 12 S. E. 50; P. v. Salsbury, 134 Mich. 537, 96 N. W. 936; S. v. Ames, 91 Minn. 365, 98 N. W. 190; White v. S., 103 Ala. 72, 16 So. 63, 67; S. v. Campbell, 73 Kan. 688, 85 P. 784, 9 L. R. A. (N. S.) 533n. Declarations of the accused are received to show intent, S. v. Durnam, 73 Mich. 150, 75 N. W. 1127. As to declarations of conspirators to bribe, see P. v. McGarry, 136 Mich. 316, 99 N. W. 147, 11 Det. Leg. N. 10.

1. Com. v. Murray, 135 Mass. 530.

2. White v. S., 103 Ala. 72, 16 So. 63; S. v. Campbell, 73 Kan. 688, 85 P. 784, 9 L. R. A. (N. S.) 533n.

3. Rath v. S., 35 Tex. Cr. 142, 33 S. W. 229; S. v. McDonald, 106 Ind. 233, 6 N. E. 607.

his appointment,[4] of his public acts,[5] and the date when his term expires,[6] is sufficient. It is sufficient also to prove that the officer is an officer *de facto*. It is no defense to an offer to bribe to show that the officer was not properly appointed or that he was unqualified.[7]

§ 127 c. **Accomplice evidence**—is usually necessary in bribery. As soon as the money is paid the briber becomes an accomplice of the officer bribed,[8] but one who merely offers a bribe for the purpose of procuring the arrest of an officer soliciting it is not an accomplice.[9] If, by statute, an accomplice in bribery is compelled to testify his evidence cannot usually be given against him. Where an accomplice in bribery is used as a witness he should be dealt with in good faith and the spirit of the statute should be strictly regarded.[10]

§ 127 d. **Other acts of bribery**,—remote in time and distinct from the act charged are usually inadmissible,[11] but separate acts of bribery are relevant as part of a system to show intent.[12]

4. Hizer v. S., 12 Ind. 330; S. v. Boyd, 34 Neb. 435.

5. S. v. Gramelspacher, 126 Ind. 398, 26 N. E. 81, citing cases; Jones v. U. S., 137 U. S. 202, 34 L. Ed. 691, 11 Sup. Ct. 80; U. S. v. Dietrich, 126 Fed. 676.

6. Doe v. Riley, 28 Ala. 164, 65 Am. Dec. 334.

7. Florez v. S., 11 Tex. Ap. 102; S. v. Gardner, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660; Com. v. Saulsbury, 152 Pa. St. 554, 25 A. 610; Com. v. Wotton, 201 Mass. 81, 87 N. E. 202; S. v. Hass, 163 Fed. 908.

8. Ruffin v. S., 36 Tex. Cr. 565, 38 S. W. 169.

9. P. v. Liphardt, 105 Mich. 80, 62 N. W. 1022; Newman v. P., 23 Colo. 300, 47 P. 278; P. v. Bunkers, 2 Cal. Ap. 197 84 P. 364.

10. P. v. Spencer, 66 Hun (N. Y.) 149, 21 N. Y. S. 33; P. v. Singer, 18 Ab. N. Cas. (N. Y.) 96; P. v. Clark, 14 N. Y. S. 642; Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, 12 Sup. Ct. 195; P. v. Clements, 5 N. Y. Cr. 282, 298, 300; Com. v. Bell, 145 Pa. St. 374, 22 A. 641.

11. P. v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. 851.

12. Guthrie v. S., 16 Neb. 667, 21 N. W. 455; S. v. Ames, 90 Minn. 183, 96 N. W. 330; S. v. Schnettler, 181 Mo. 173, 79 S. W. 1123.

CHAPTER CV.

BURGLARY AND OTHER LIKE BREAKINGS.

Consult—for the law of these offenses, New Crim. Law, II, §§ 90-120; and the indexes to New Crim. Law and Stat. Crimes. For the form of the indictment and other questions of procedure, Dir. & F., §§ 251-261. And see the indexes to these volumes of New Crim. Pro.

§ 128. **How Chapter divided.**—We shall consider, I. In General of the Indictment; II. The Allegation and Proof of Time; III. The Allegation and Proof of Place; IV. The Allegation and Proof of Ownership; V. The Allegation and Proof of the Breaking and Entering; VI. The Allegation and Proof of the Intent. Under which several sub-titles, something will be included of the practice. VII. Further of the Evidence.

I. *In General of the Indictment.*

§ 129. 1. **What Allege and Prove at Common Law.**—Since common law burglary is one's breaking and entering, in the night, of another's dwelling-house, with intent to commit a felony therein,[24] the indictment must charge, with date and place, that the defendant, in the night, broke and

24. New Crim. Law, II, § 90; S. v. Beeman, 51 Wash. 557, 99 P. 756; P. v. Piner, 11 Cal. Ap. 542, 105 P. 780; Harris v. P., 44 Mich. 305, 6 N. W. 677; Rayland v. S., 71 Ark. 65, 70 S. W. 1039; Bird v. S., 49 Tex. 96, 90 S. W. 651.

entered a dwelling-house,[25] which it sufficiently describes, with the intent to commit therein a felony, which it adequately particularizes, or that he committed therein the felony, or both. And—

2. **In Form,**—as this offense is within certain limitations an attempt, the rules stated under the title "Attempt,"[26] in substance govern the indictment; thus, the law punishes the combined act of breaking and entering a dwelling-house in the night to commit a felony, not as the misdemeanor of attempt, which on ordinary principles it would do, but elevates it into the felony of burglary.[27] Yet, contrary to a common law rule in attempt,[28] it does not cease to be burglary though he goes forward to the consummation of the felony intended. Hence,—

3. **"Feloniously and Burglariously."**—In States where the common law rules remain unaltered, the criminal act must be charged as done both "feloniously"[29] and "burglariously,"[30]—terms of art for which there are no substitutes.[31]

§ 130. 1. **For Statutory Burglaries,**—shop-breakings, etc., the indictment must be the same, unless the statutory

25. No need to allege that there was any person in the house. S. v. Reid, 20 Iowa, 413; Parker v. S., 114 Ala. 690, 22 So. 791; Dunn v. Com., 119 Ky. 457, 84 S. W. 321, 27 Ky. L. 113. Under statutory burglary naming buildings other than dwellings as shops, storehouses, barns, etc., the indictment must follow closely or substantially the language of the statute descriptive of the building. P. v. Webber, 138 Cal. 145, 70 P. 1089, ("a railroad car"). S. v. Haney, 110 Iowa, 26, 81 N. W. 151, ("planing mill" under a statute mentioning a "building"). S. v. South, 136 Mo. 675, 38 S. W. 716, (a barn). S. v. Dale, 141 Mo. 284, 42 S. W. 722, 64 Am. St. 513; S. v. Watson, 141 Mo. 338, 42 S. W. 726, ("granary" or warehouse). S. v. Burdett, 47 S. W. 796, 145 Mo. 674.

26. Ante, §§ 86-93.

27. New Crim. Law, II, §§ 90, 112.

28. Ante, § 94.

29. Vol. II, § 534.

30. Vaux v. Brook, 4 Co. 39b; Long's Case, 5 Co. 120a, 121b; 3 Inst. 64; 1 Hale P. C. 550, 560, 562; 2 Hawk. P. C. c. 25, § 55; 2 East P. C. 512; 2 Russ. Crimes, 5th Eng. Ed. 47; Parke, B. in Holford v. Bailey, 13 Q. B. 426, 446; S. v. McDonald, 9 W. Va. 456; S v. Meadows, 22 W. Va. 766. And see P. v. Long, 43 Cal. 444; S. v. Cottrell, 45 W. Va. 837, 32 S. E. 162.

31. Vol. I, § 335.

terms require or permit a modification; then it must be enlarged or varied by what will bring it within the statute. On this sort of question, our American statutes are quite diverse.[32]

2. **Neither "Burglariously"** [33] **nor "Feloniously"** [34]—is under some statutes necessary; but generally both are so, the same as at common law. Again,—

3. **Degrees.**—Statutes dividing burglary into degrees require differing alterations in the indictment, according to their terms.[35]

§ 130 a. Attempts.—There are common law and statutory attempts to commit burglary, and acts indictable by statutes because tending to it, the allegations for which will be obvious.[36]

32. Vol. II, §§ 610, 611; Norris v. S., 50 Ala. 126; Robinson v. S., 52 Ala. 587; Webb v. S., 52 Ala. 422; Neal v. S., 53 Ala. 465; Reg. v. Wenmouth, 8 Cox C. C. 348; S. v. Watkins, 11 Nev. 30; S. v. Maxwell, 42 Iowa, 208; Henderson v. S., 70 Ala. 23; Pines v. S., 50 Ala. 153; Hall v. S., 48 Wis. 688, 4 N. W. 1068; S. v. Kane, 63 Wis. 260, 23 N. W. 488; S. v. Davis, 73 Mo. 129; Short v. S., 63 Ind. 376; Brennan v. P., 110 Ill. 535; Kelley v. S., 72 Ala. 244; Mace v. S., 9 Tex. Ap. 110; Summers v. S., 9 Tex. Ap. 396; Hamilton v. S., 26 Tex. Ap. 206; Brown v. S., 7 Tex. Ap. 619; Miller v. S., 16 Tex. Ap. 417; Lott v. S., 17 Tex. Ap. 598; P. v. Richards, 108 N. Y. 137, 2 Am. St. 373, 15 N. E. 371; P. v. Murray, 67 Cal. 103, 7 P. 178; U. S. v. Williams, 57 Fed. Rep. 201; Glaze v. S., 2 Ga. Ap. 704, 58 S. E. 1126; S. v. Johnson, 64 Ohio St. 270, 60 N. E. 219; S. v. Dolson, 22 Wash. 259, 60 P. 653; S. v. Randall, 36 Wash. 438, 78 P. 998.

33. Lyons v. P., 68 Ill. 271; Tully v. C., 4 Met. 357; S. v. Short, 54 Iowa, 392, 6 N. W. 584; S. v. Jordan, 39 La. Ann. 340, 1 So. 655; S. v. Cottrell, 45 N. W. 837, 32 S. E. 162. See Jones v. S. (Tex. 1900), 55 S. W. 491.

34. Vol. II, § 535; Reed v. S., 14 Tex. Ap. 662. See S. v. Lewis, 13 S. D. 166, 82 N. W. 406.

35. Quinn v. P., 71 N. Y. 561, 27 Am. R. 87; P. v. Van Gaasbeck, 9 Abb. Pr. n. s. 328; S. v. Alexander, 56 Mo. 131; S. v. Behee, 17 Kan. 402; Butler v. P., 4 Denio, 68; P. v. Barnhart, 59 Cal. 381; P. v. Travers, 73 Cal. 580, 15 P. 293. And see Hollister v. C., 60 Pa. 103; Johnston v. C., 85 Pa. 54, 27 Am. R. 622; Conoly v. S., 2 Tex. Ap. 412; Philbrick v. S., 2 Tex. Ap. 517; Williams v. S., 46 Ga. 212; Wood v. S., 46 Ga. 322; C. v. Reynolds, 122 Mass. 454.

36. Reg. v. Jerrald, Leigh & C., 301, 9 Cox C. C. 307; Reg. v. Bailey, Dears. 244, 6 Cox C. C. 241; C. v. Tivnon, 8 Gray, 375, 69 Am. D. 248.

II. *The Allegation and Proof of Time.*

§ 131. 1. **The Day and Year**—should be alleged, as in other non-continuing offenses;[37] though proof of another day sustains the allegation.[38] Also,—

2. **Night—(Hour).**—As burglary can be committed only in the night,[39] the indictment must charge it so.[40] We have intimations that "burglariously,"[41] without more, indicates sufficiently that the act was in the night;[42] but the contrary has been adjudged,[43] and justly, for such averment is but argumentative, never adequate in criminal pleading.[44] A common form of setting out the time is, after stating the day, to proceed "about the hour of eleven in the night of the same day;"[45] and though this is objectionable by reason of the indefinite word "about,"[46] it is legally adequate.[47] By some authorities, the mention of an hour is essential, but by all it need not be proved as laid.[48]

§ 132. **Further of Hour.**—Hale says, in one place, that the words *in nocte ejusdem diei* are sufficient; but, in another, that the allegation could be *tali die circa horam*

37. Vol. I, § 387 et seq.

38. S. v. Dawkins, 32 S. C. 17, 10 S. E. 772. See S. v. Malone, 28 La. Ann. 80.

39. New Crim. Law, II, § 101; Stat. Crimes, § 276; S. v. Miller, 24 Utah, 312, 67 P. 790. Night time defined, Griffith v. S., 62 Tex. Cr. 642, 138 S. W. 1016.

40. Vol. I, § 399; C. v. Kaas, 3 Brews. 422; S. v. Mather, N. Chip. 32; Hall v. P., 43 Mich. 417, 5 N. W. 449; S. v. Ruby, 61 Iowa, 86, 15 N. W. 848; Jones v. S., 63 Ga. 141; Jackson v. S. (Tex. Cr. Ap.), 38 S. W. 990.

41. Ante, § 129 (3).

42. 2 Hale P. C. 179; Patterson, J. in Reg. v. Thompson, 2 Cox C. C. 445, 446.

43. Fusse's Case, Cro. Eliz. 583; Lewis v. S., 16 Conn. 32.

44. Vol. I, §§ 325, 331; Vol. II, §§ 508, 518.

45. Matthews Crim. Law, 434; Archb. Crim. Pl. & Ev. 19th Ed. 536; 3 Chit. Crim. Law, 1117.

46. Vol. I, § 390.

47. 2 Hawk. P. C. c. 23, § 87; S. v. Seymour, 36 Me. 225; Methard v. S., 19 Ohio St. 363. Compare S. v. Lovelace, 29 Nev. 43, 83 P. 330.

48. 2 East P. C. 513; Lewis v. S., 16 Conn. 32; S. v. G. S., 1 Tyler, 295; Mark's Case, 4 Leigh, 658; C. v. McLaughlin, 11 Cush. 598. And see S. v. Bancroft, 10 N. H. 105.

decimam in nocte ejusdem diei.[49] The latter was subsequently adjudged: because, "as the rule now established was that a burglary could not be committed during the twilight, it was therefore necessary to specify the hour, in order that the fact might appear upon the face of the indictment to have been done between the twilight of the evening and that of the morning."[50] Now,—

§ 133. **As to which.**—If, by the common law or by a statute, burglary can be committed only during a part of the hours which are night, this reasoning and conclusion are correct.[51] But the true view is believed to be that the reason why by the common law a burglary cannot be committed in twilight is, not because only the darker part of the night is allotted to this offense, but because twilight is day—imperfect, indeed—and not night;[52] which reasoning leads to the conclusion, sustained by a part of the authorities, that the allegation of the hour is not essential.[53] Even where a statute makes the night, for criminal purposes, begin one hour after sunset and end one hour before sunrise,[54] so that portions of what is popularly termed night are not night in law, an averment that a burglary was committed in the night of the day is deemed to mean the legal night, and it need not specify the hour.[55]

§ 133 a. **Day.**—For a statutory offense in the nature of burglary, which may or must be committed in the day,[56] the indictment will be good or not, with the simple allegation of the day of the month, according to the statutory

49. 1 Hale P. C. 549; 2 Ib. 179.

50. Rex v. Waddington, 2 East P. C. 513. And see other cases cited to the last section and this.

51. See, for the principle, Vol. I, § 399.

52. Stat. Crimes, § 276.

53. P. v. Burgess, 35 Cal. 115; Bethune v. S., 48 Ga. 505; Reed Ga. Crim. Law, 57. And see S. v. Robinson, 6 Vroom, 71; Hackett v. C., 15 Pa. 95.

54. Mass. Stat. 1847, c. 13.

55. C. v. Williams, 2 Cush. 582; P. v. Burgess, supra; S. v. Robinson, supra. And see Davis v. S., 3 Coldw. 77; Leisenberg v. S., 60 Neb. 628, 84 N. W. 6. See, under the English statute defining nighttime, Reg. v. Thompson, 2 Cox C. C. 445.

56. New Crim. Law, II, §§ 102, 103; P. v. Smith, 136 Cal. 207, 68 P. 702.

terms. If the crime is punishable more heavily when committed in the day than in the night, the indictment, to justify the heavier punishment, must charge it in the day.[57] But ordinarily, if only the lower punishment is sought to be inflicted, the allegation of daytime is not essential.[58] Still, in other circumstances, apparent on an inspection of the statutes, it is necessary,—a question on which the authorities are perhaps not in all particulars quite harmonious.[59]

§ 134. **Proof of Night.**—That the offense was committed in the night, when essential in law, must be affirmatively shown;[60] and the defendant will have the benefit of any reasonable doubt[61] as to the time.[62] Direct testimony, circumstances, and presumptions may all be considered.[63] The

57. Vol. I, § 77 et seq.; Reed Ga. Crim. Law, 57; S. v. Neddo, 92 Me. 71, 42 A. 253.

58. C. v. Reynolds, 122 Mass. 454; Butler v. P., 4 Denio, 68; S. v. Miller, 3 Wash. 131, 28 Pac. 375; S. v. Mish, 36 Mont. 168, 92 P. 459; Wilks v. S. (Tex. 1900), 51 S. W. 902; Miller v. S., 77 S. W. 800.

59. Haggett v. C., 3 Met. 457; Hopkins v. C., 3 Met. 460; Hutchinson v. C., 4 Met. 359; Davis v. S., 3 Coldw. 77. And see Hollister v. C., 60 Pa. 103; Williams v. S., 46 Ga. 212; Wood v. S., 46 Ga. 322; S. v. Behee, 17 Kan. 402; P. v. Taggart, 43 Cal. 81; Bravo v. S., 20 Tex. Ap. 188; Coates v. S., 31 Tex. Cr. 257, 20 S. W. 585; Com. v. Bunnell, 20 Pa. Sup. Ct. 51; Vargas v. S., 60 Tex. Cr. Ap. 196, 131 S. W. 594.

60. S. v. Whit, 4 Jones, N. C. 349; S. v. Bancroft, 10 N. H. 105; Ashford v. S., 36 Neb. 38, 40, 53 N. W. 1036; Bergeron v. S., 53 Neb. 752, 74 N. W. 253; S. v. Seymour, 36 Me. 225, 227; S. v. Leaden, 35 Conn. 515; Guynes v. S., 25 Tex. Ap. 584, 8 S. W. 667; Waters v. S., 53 Ga. 567; P. v. Taggart, 43 Cal. 81, 87; Allen v. S., 40 Ala. 334, 91 Am. Dec. 477n; Com. v. Glover, 111 Mass. 395, 402; Keller v. S., 73 Neb. 441, 103 N. W. 64.

61. Vol. II, § 1093.

62. Vol. II, § 1095; Waters v. S., 53 Ga. 567.

63. Houser v. S., 58 Ga. 78; C. v. Robinson, 1 Gray, 555; S. v. Leaden, 35 Conn. 515; P. v. Curley, 99 Mich. 238, 58 N. W. 68; Feister v. P., 125 Ill. 348, 17 N. E. 748; Alexander v. S., 31 Tex. Cr. 359, 20 S. W. 756; S. v. McKnight, 111 N. C. 690, 16 S. E. 319; Painter v. S., 26 Tex. Ap. 454; S. v. Morris, 47 Conn. 179; Smith v. S., 62 Ga. 663; Brown v. S., 59 Ga. 456; S. v. Meche, 42 La. Ann. 273, 7 So. 573; Herndon v. S., 50 Tex. Cr. 552, 99 S. W. 558; P. v. Lowrie, 4 Cal. App. 137, 87 P. 253; S. v. Richards, 29 Utah, 310, 81 P. 142. The condition of the house after the breaking is competent. It may be inferred the breaking was during the night from

mere bulky character of the goods will not sustain the allegation that the time of taking was the night.[64]

III. *The Allegation and Proof of Place.*

§ 135. 1. **Vill, etc.**—At the time when the vill, parish, or other minor locality had to be stated in every indictment, not now essential,[65] it was the ordinary course in burglary to say that the place broken was "situate" therein, and this practice is not uncommon still.[66] The minor locality being thus alleged descriptively, proof of it as laid is therefore indispensable.[67] But the descriptive form of the allegation is certainly not necessary;[68] still, in England, the setting out of the minor locality in some form, and proof of it descriptively corresponding, appear to be required.[69] Yet as this question has generally arisen in connection with the words "there situate," involving that of variance, this conclusion is perhaps not inevitable.[70] With us, no principle appears requiring the minor locality

the fact that the house was found open in the morning. P. v. Lowrie, 4 Cal. Ap. 137, 87 P. 253. It may be shown that accused had purchased burglar's tools. P. v. Calvert, 22 N. Y. S. 220, 67 Hun (N. Y.), that he had been seen near the premises. S. v. Turner, 106 Mo. 272, 17 S. W. 304; P. v. Ranier, 137 Ap. Div. (N. Y.) 47, 111 N. Y. S. 112, and had made inquiries as to the property there. Gilmore v. S., 99 Ala. 154, 13 So. 536, as to the habits of its inmates. S. v. Ward, 103 N. C. 419, 423, 8 S. E. 814. It may be shown he was found in the premises which were broken into subject to explanation on his part. Mason v. S., 153 Ala. 46, 45 So. 472, and that property taken from the premises was found in his possession. Delmont v. S., 15 Wyo. 271, 88 P. 623.

64. S. v. Frahm, 73 Iowa, 355.

65. Vol. I, §§ 362-370.

66. Matthews Crim. Law, 434; 3 Chit. Crim. Law, 1118-1121; Archb. Crim. Pl. & Ev. (19th Ed.) 536. See ante, § 41.

67. Vol. II, § 488.

68. Ante, § 41; Rex v. Napper, 1 Moody, 44.

69. Russ. Crimes (5th Eng. Ed.), 44-48; Carny's Case, 3 City Hall Rec. 44.

70. Russell, who states the proposition as undoubted, cites Rex v. Napper, 1 Moody, 44; Reg. v. Brookes, Car. & M. 543; Rex v. Richards, 1 Moody & R. 177; Reg. v. St. John, 9 Car. & P. 40; Reg. v. Frowen, 4 Cox, C. C. 266; Reg. v. Jackson, 2 Russ. Crimes (5th Eng. Ed.), 46; Reg. v. Howell, 1 Cox, C. C. 190.

to be either charged or proved.[71] There may be cases in which it has been deemed essential;[72] in others it has been adjudged not to be,[73] and one cannot well resist the conviction that the latter is the true American law.[74]

2. **The Place broken at Common Law**—should be stated as the "dwelling-house," or "mansion-house;" "house" will not suffice.[75] If it is a barn or other out-building, which in law is parcel of the dwelling-house, the pleader has his election to employ simply the term "dwelling-house,"[76] or name the out-building and add "part of the dwelling-house."[77]

§ 136. **For a Statutory Breaking**—the indictment should employ the statutory word; as, "shop,"[78] "store,"[79] "office,"[80] "ware-house."[81] And if to such a place the statute adds a descriptive phrase, it should be covered by the allegation.[82]

71. Vol. I, § 370.

72. Carny's Case, supra.

73. Spencer v. S., 13 Ohio, 401, 407.

74. Compare with ante, §§ 41, 111; Dir. & F., § 254.

75. Stat. Crimes, § 277; C. v. Pennock, 3 S. & R. 199; Simpson v. S., 5 Okla. Cr. Ap. 57, 113 P. 549; Malley v. S., 58 Tex. Cr. Ap. 425, 126 S. W. 598.

76. Ante, § 34; Stat. Crimes, § 278; 3 Inst. 64; 1 Hale, P. C. 557; Fletcher v. S., 10 Lea, 338.

77. 2 Russ. Crimes (5th Eng. Ed.) 43. See S. v. Evans, 18 S. C. 137; P. v. Young, 65 Cal. 225, 3 P. 813. Contra by Statute, Hutchins v. S., 3 Ga. Ap. 300, 59 S. E. 848. Use and occupancy as residence to be alleged. Jones v. S., 50 Tex. Cr. 100, 96 S. W. 44.

78. Stat. Crimes, § 295; C. v. Tuck, 20 Pick. 356; S. v. Golden, 86 Minn. 206, 90 N. W. 398; Moore v. S., 59 Tex. Cr. Ap. 361, 128 S. W. 1115.

79. Stat. Crimes, §§ 295, 1011; C. v. Whalen, 131 Mass. 419; P. v. Edwards, 59 Cal. 359.

80. Larned v. C., 12 Met. 240; DeVoe v. C., 3 Met. 316; Evans v. C., 3 Met. 453; Phillips v. C. C., 3 Met. 588; C. v. Moriarty, 135 Mass. 540; Norton v. S., 74 Ind. 337.

81. Stat. Crimes, § 293; Spencer v. S., 13 Ohio, 401. "Houseboat." Nagel v. P., 229 Ill. 598, 82 N. E. 315.

82. Norris v. S., 50 Ala. 126; Robinson v. S., 52 Ala. 587; Webb v. S., 52 Ala. 422; Neal v. S., 53 Ala. 465; Rowland v. S., 55 Ala. 210; Danner v. S., 54 Ala. 127, 25 Am. R. 662; Hurt v. S., 55 Ala. 214; Matthews v. S., 55 Ala. 65; Crawford v. S., 44 Ala. 382; Bell v. S., 20 Wis. 599; Dickinson v. S., 148 Ala. 676, 41 So. 929; Sedgwick

IV. *The Allegation and Proof of Ownership.*

§ 137. 1. **Essential.**—The ownership of the building broken must be alleged,[83] and without variance[84] proved as laid.[85] But—

2. **The Meaning of Ownership**—varies with the offense. Burglary is not a disturbance to the fee of the place as realty, but to the habitable security.[86] Therefore, in burglary, ownership means any possession which is rightful as against the burglar.[87]

v. S. (Tex. Cr. Ap. 1909), 123 S. W. 702. "Dwelling-house" in statutory burglary. Com. v. Woolfolk, 28 Ky. L. 114, 89 S. W. 110.

83. Vol. II, §§ 573, 581; ante, § 36; Rex v. White, 1 Leach, 252, 2 East, P. C. 513, 780; Davis v. S., 54 Ala. 88; S. v. Morrissey, 22 Iowa, 158; C. v. Perris, 108 Mass. 1, 3; S. v. Fockler, 22 Kan. 542; Graves v. S., 63 Ala. 134; S. v. Reece, 27 W. Va. 375. See S. v. Clifton, 30 La. Ann. 951; Davis v. S., 51 Fla. 37, 40 So. 179; S. v. Davis, 138 Mo. 107, 39 S. W. 460; Simpson v. S., 5 Okla. Cr. Ap. 57, 113 P. 549; Cooper v. S., 89 Ga. 222, 15 S. E. 291; McCrillis v. S., 69 Ind. 159; S. v. Harned, 178 Mo. 59, 76 S. W. 953; S. v. James, 194 Mo. 268, 92 S. W. 679; S. v. Hupp, 31 W. Va. 355, 6 S. E. 919.

84. Vol. II, § 484a et seq.; Doan v. S., 26 Ind. 495.

85. Vol. II, §§ 488, 488b (3); ante, § 36 (1); Reg. v. Cranage, 1 Salk. 385; S. v. Lee, 1 Houst. Crim. 335; P. v. Ayhens, 16 Cal. Ap. 618, 117 P. 789. Ownership of property which accused intends to steal is surplusage. S. v. Simpson, 32 Nev. 138, 104 P. 244.

86. New Crim. Law, I, § 577 (4).

87. Consult cases cited to the next section; also S. v. Parker, 16 Nev. 79; S. v. Golden, 49 Iowa, 48; Ashton v. S., 68 Ga. 25; Johnson v. C., 87 Ky. 189, 7 S. W. 927; Kennedy v. S., 81 Ind. 379; S. v. McIntire, 59 Iowa, 264, 267, 13 N. W. 286, 287. And compare with ante, § 36, Huling v. S., 17 Ohio St. 583, 589; Pack v. S., 147 Ala. 100, 41 So. 759; Hall v. S., 7 Ga. Ap. 115, 66 S. E. 390; Radley v. S., 174 Ind. 645, 92 N. E. 541; Spencer v. S., 5 Okla. Cr. 7, 113 P. 224; Farris v. S. (Tex.), 69 S. W. 140; Moore v. S., 48 Tex. Cr. Ap. 400, 88 S. W. 230; Knuckles v. S., 55 Tex. Cr. Ap. 6, 114 S. W. 825. The ownership of the property stolen need not be strictly proved. S. v. Tyrrell, 98 Mo. 354, 11 S. W. 734; Brown v. S., 72 Miss. 990, 18 So. 431; P. v. Edwards, 59 Cal. 359; S. v. Hutchinson, 111 Mo. 257, 263, 20 S. W. 34; Calloway v. S., 50 Tex. Cr. Ap. 72, 94 S. W. 902, neither need the number of articles taken. Johnson v. Com., 87 Ky. 189, 7 S. W. 927, 10 Ky. L. 100, nor their value. Farley v. S., 127 Ind. 419, 26 N. E. 898; Mason v. S. (Tex. 1906), 98 S. W. 854; Boyd v. S., 4 Ga. Ap. 273, 61 S. E. 134.

§ 138. 1. **In whom laid.**—Under various circumstances the ownership may be laid equally well in one person or another; as, in the master, or in the servant occupying under him.[88] This is an important consideration, without which many of the cases will appear conflicting. In general, possession and occupancy by the alleged owner are all that are required.[89] While he need not own the fee, he need not even pay rent.[90] "It is enough that it was his actual dwelling-house at the time."[91] Even a possession unlawful as against the person claiming title, but lawful as against the burglar, will suffice.[92] To illustrate,—

2. **Master and Servant.**—Where one as mere servant occupies a dwelling-house,[93] the ownership is well laid in the master.[94] Or, if the servant is in independent control, it may be laid in him,[95] otherwise not.[96] And it must be, if he pays rent to the master, who retains no authority over the premises.[97]

3. **Husband and Wife.**—Under our unwritten law, the rules of the common law, in distinction from equity,[98] prevail in criminal cases. And under this law, a wife can have

88. Rex v. Rees, 7 Car. & P. 568; Daggett v. S., 39 Tex. Cr. Ap. 5, 44 S. W. 148.

89. Ante, § 36 (2); Markham v. S., 25 Ga. 52; S. v. Jaynes, 78 N. C. 504; Webb v. S., 52 Ala. 422; White v. S., 49 Ala. 344; S. v. Davenport (Del. 1910), 77 A. 967; S. v. Ferguson, 149 Iowa, 476, 128 N. W. 840; Richardson v. S., 115 Ala. 113, 22 So. 558; Peck v. S., 147 Ala. 100, 41 So. 759; Gilbert v. S., 116 Ga. 819, 43 S. E. 47; S. v. Williams, 120 Iowa, 36, 94 N. W. 255; S. v. Golden, 86 Minn. 206, 90 N. W. 398; Hahn v. S., 60 Neb. 487, 83 N. W. 674.

90. Rex v. Collett, Russ. & Ry. 498.

91. P. v. Van Blarcum, 2 Johns. 105; P. v. Smith, 1 Par. Cr. 329.

92. Ante, § 37 (1); Houston v. S., 38 Ga. 165.

93. Ante, § 37 (2).

94. Rex v. Stock, 2 Taunt. 339, 2 Leach, 1015, Russ. & Ry. 185; Rex v. Picket, 2 East, P. C. 501.

95. Rex v. Rees, supra; Rex v. Jobling, Russ. & Ry. 525; Rex v. Camfield, 1 Moody, 42; Rex v. Witt, 1 Moody, 248; Rex v. Margetts, 2 Leach, 930; Bradley v. S., 2 Ga. Ap. 322, 58 S. E. 1064.

96. Rex v. Rawlins, 7 Car. & P. 150; Rex v. Hawkins, Foster, 38; Reg. v. Ashley, 1 Car. & K. 198; Reg. v. Williams, 1 Hale P. C. 522. And see Rex v. Maynard, 2 East P. C. 501; Burgess's Case, J. Kel. 27, 1 Leach, 324, note.

97. Rex v. Jarvis, 1 Moody, 7.

98. Vol. II, § 1412.

no possessory rights of property real or personal. All such are the husband's.[99] Hence at common law, the ownership of the wife's dwelling-house must be laid in him, even though she is living with another man in adultery,[1] or otherwise separate from him, and she pays the rent.[2] It seems that under the Ohio statute the ownership may be laid in a wife who lives apart from her husband.[3] So it may be under a part or all of our statutes giving her a separate property capacity, and other rights not before hers, at law.[4]

4. **Partners.**—Where two partners carry on business in a building, while only one lives in it, the indictment may still lay it as the dwelling-house of the two.[5] Yet if they jointly hire two dwelling-houses under one roof, with no internal communication, and each occupies one, a burglary in either must be charged as in the dwelling-house of him who therein resides.[6] Where the occupancy is all several, and in no degree joint, the ownership must be laid in one, not both.[7] If it is joint, the ownership may be stated as in both, though the real proprietorship is in one.[8] Under some of the statutes it suffices to lay a joint ownership as in one;[9] there need be no special allegation of a partnership.[10]

5. **In a Corporation**—the ownership may be laid even of a dwelling-house, certainly under some of the statutes,

99. 1 Bishop Mar. Women, §§ 52, 53, 64, 65, 883-885.

1. Rex v. Wilford, Russ. & Ry. 517.

2. Rex v. French, Russ. & Ry. 491; Rex v. Farre, J. Kel. 43; Rex v. Smyth, 5 Car. & P. 201. See Bogget v. Frier, 11 East, 301.

3. Ducher v. S., 18 Ohio, 308, 316.

4. S. v. Trapp, 17 S. C. 467, 43 Am. R. 614; S. v. Peach, 70 Vt. 283, 40 A. 732 and see, also, Richardson v. S., 115 Ala. 113, 22 So. 558. And see S. v. Wincroft, 76 N. C. 38; S. v. Matthews, 76 N. C. 41; Morgan v. S., 63 Ga. 307; post, § 726.

5. Rex v. Athea, 1 Moody, 329. And see S. v. Davis, 77 N. C. 490; White v. S., 49 Ala. 344.

6. Rex v. Jones, 1 Leach, 537.

7. Ante, § 38; S. v. Betsall, 11 W. Va. 703.

8. Webb v. S., 52 Ala. 422; White v. S., 49 Ala. 344; S. v. Davis, 77 N. C. 490.

9. White v. S., 72 Ala. 195.

10. P. v. Rogers, 81 Cal. 209, 22 Pac. 592. See also S. v. Ellison, 58 N. H. 325.

doubtless also at common law.[11] The *de facto* character of the corporation only need be shown in evidence.[12]

6. **A Guest**—in a private house has no ownership in the room wherein he sleeps.[13] Even a guest's room at an inn must be laid as the landlord's.[14] So,—

7. **Lodgers—(Separate Families).**—Rooms let to lodgers, by one residing in his own dwelling-house, should, like those not let, be laid in him;[15] unless there is no internal communication between them, in which case the ownership is in the particular lodger who hires the room.[16] And though there is such communication, the room of a lodger is to be laid as his, if the other rooms are not occupied for habitation.[17] If all are so occupied, either by different lodgers or by separate families, yet none by the landlord, each apartment is regarded as the dwelling-house of its occupant, though it communicates internally with the others.[18]

11. S. v. Emmons, 72 Iowa, 265, 33 N. W. 672; Peck v. S., 147 Ala. 100, 41 So. 759; S. v. Kelley, 206 Mo. 685, 105 S. W. 606.

12. Burke v. S., 34 Ohio St. 79; Hamilton v. S., 34 Ohio St. 82. And see, as to this paragraph, Nicholls v. S., 68 Wis. 416, 60 Am. R. 870, 32 N. W. 543; S. v. Shields, 89 Mo. 259, 1 S. W. 336; Aldridge v. S., 88 Ala. 113, 16 Am. St. 23, 7 So. 48; Vol. II, § 682; S. v. Sowell, 85 S. C. 278, 67 S. E. 316; Gilbert v. S., 116 Ga. 819, 43 S. E. 47; S. v. Watson, 102 Iowa, 651, 72 N. W. 283; S. v. Golden, 86 Minn. 206, 90 N. W. 398; S. v. Shields, 89 Mo. 259, 1 S. W. 336; S. v. Harned, 178 Mo. 59, 76 S. W. 953.

13. Stat. Crimes, § 287; Rex v. Williams, 1 Hale P. C. 522; Burgess's Case, J. Kel. 27, 1 Leach, 324, note.

14. 1 Hale P. C. 557; Rex v. Prosser, 2 East P. C. 502; Rodgers v. P., 86 N. Y. 360, 40 Am. R. 548. And see New Crim. Law, II, § 106; S. v. Clark, 42 Vt. 629; S. v. Moore, 12 N. H. 42; S. v. Johnson, 4 Wash. 593, 30 P. 672; Jones v. S., 75 Ga. 825.

15. Stat. Crimes, § 287; New Crim. Law, II, § 106 (3); Rex v. Rogers, 1 Leach, 89; Anonymous, 1 Leach, 90, note; Anonymous, J. Kel. 83; 2 East P. C. 503; Rex v. Gibbons, Russ. & Ry. 442; Rex v. Sefton, Russ. & Ry. 202; S. v. Cox, 39 Wash. 345, 81 P. 848.

16. Rex v. Rogers, supra; Anonymous, J. Kel. 83.

17. Rex v. Turner, 1 Leach, 305; Rex v. Wilson, Russ. & Ry. 115.

18. Stat. Crimes, § 287; New Crim. Law, II, § 108; Rex v. Carrell, 1 Leach, 237; Rex v. Rogers, 1 Leach, 89. And see Rex v. Trapshaw, 1 Leach, 427; Rex v. Bailey,

§ 138 a. **In Parts of a Building not for Habitation,**—burglary may be committed if they internally connect with those inhabited; thereupon the ownership should be laid in him who occupies the inhabited part.[19]

§ 139. **The Form of alleging Ownership**—is ordinarily in practice simply, at common law, that the place broken was "the dwelling-house of" a person named.[20] It is not good to say of "the estate of such a person,"[21] unless a statute makes it so. Both the Christian and surname of the owner should be given; even when the ownership is in a firm, this at common law is so of all the partners, and the names should be proved as laid.[22]

V. *The Allegation and Proof of the Breaking and Entering.*

§ 140. **"Break and Enter."**—The indictment charges that the defendant did "break and enter" the place.[23] Both

1 Moody, 23; P. v. St. Clair, 38 Cal. 137; Mason v. P., 26 N. Y. 200; P. v. Bush, 3 Par. Cr. 552. See C. v. Thompson, 9 Gray, 108.

19. Stat. Crimes, § 280; Rex v. Stock, 2 Taunt. 339; 2 Leach, 1015, Russ. & Ry. 185; Rex v. Witt, 1 Moody, 248; Rex v. Bailey, 1 Moody, 23; Rex v. Carrell, 1 Leach, 237; Rex v. Gibbons, Russ. & Ry. 442; Rex v. Sefton, Russ. & Ry. 202. Where no part is for habitation, a statutory offense not required to be in a dwelling-house may be laid as committed under the ownership of the occupier. S. v. Rand, 33 N. H. 216.

20. Ante, § 39; Bell v. S., 20 Wis. 599. For various forms of expressing the idea, under differing conditions of the law, see Webster v. C., 80 Va. 598; Murray v. S., 48 Ala. 675; S. v. Fox, 80 Iowa, 312, 20 Am. St. 425; Butler v. C., 81 Va. 159; S. v. Franks, 64 Iowa, 39, 19 N. W. 832; Sullivan v. S., 13 Tex. Ap. 462; Coates v. S., 31 Tex. Cr. 257, 20 S. W. 585.

Public Building.—"The city hall of the city of Charlestown," sufficient. C. v. Williams, 2 Cush. 582. See ante, § 36 (1); Davis v. S., 38 Ohio St. 505; Johnson v. S., 73 Ala. 483. Also, "A building, called a bank, being the bank of the New Hampshire Savings Bank in Concord." S. v. Rand, 33 N. H. 216. "The property of" etc. Davis v. S., 54 Fla. 34, 44 So. 757.

21. Post, § 725; Beall v. S., 53 Ala. 460 (overruling Anderson v. S., 48 Ala. 665, 17 Am. R. 36). And see Murray v. S., 48 Ala. 675; S. v. Hammons, 226 Mo. 604, 126 S. W. 422.

22. Post, § 73; Doan v. S., 26 Ind. 495. And see C. v. O'Brien, 12 Allen, 183; ante, § 138 (4).

23. Matthews Crim. Law, 424; Archb. Crim. Pl. & Ev. (19th Ed.) 5-6.

words are essential.[24] And the evidence of both must be adequate.[25] Two breakings in one night do not necessarily make two offenses.[26] But—

§ 141. 1. **Under some of the Statutes**—the law of this subject is modified, corresponding whereto must be the indictment.[27] And—

2. **Guilty of Part.**—There may be a conviction either for the whole or for any minor part of the offense adequately charged.[28]

24. New Crim. Law, II, §§ 90, 91, 92; S. v. McPherson, 70 N. C. 239, 16 Am. R. 769; Pines v. S., 50 Ala. 153; S. v. Whitby, 15 Kan. 402. See, Harris v. S., 44 Mich. 305, 6 N. W. 677. And see Mathews v. S., 36 Tex. 675.

25. Williams v. S., 52 Ga. 580; Kelley v. S., 31 Tex. Cr. 211, 20 S. W. 365; P. v. Curley, 99 Mich. 238, 58 N. W. 68; S. v. Christmas, 101 N. C. 749, 8 S. E. 361; S. v. Brown, 33 S. C. 151, 11 S. E. 641; Seling v. S., 18 Neb. 548, 26 N. W. 254. Further as to which, see elucidations in New Crim. Law and Stat. Crimes. The condition of the premises before and after is always relevant. A view of the premises is usually permitted to the jury. Proof of drawing a bolt, Kent v. S., 84 Ga. 438, 11 S. E. 355, 20 Am. St. 376, lifting of latch, S. v. O'Brien, 81 La. 93, 95, 46 N. W. 861; S. v. Groning, 33 Kan. 18, 21, 5 P. 446; Carter v. S., 68 Ala. 96, 97, pushing open a closed door, P. v. Nolan, 22 Mich. 229, 235; S. v. Reid, 20 Ia. 413, 421, 422; Mason v. P., 26 N. Y. 200; S. v. Conners, 95 Ia. 485, 64 N. W. 295; Price v. Com. (Ky.), 112 S. W. 855; P. v. Gartland, 3 Ap. Div. (N. Y.) 534, 52 N. Y. S. 352, or a window which was fastened, Sims v. S., 136 Ind. 358, 360, 36 N. E. 278; S. v. Moore, 117 Mo. 395, 22 S. W. 1086; Holland v. S., 47 Tex. Cr. 623, 85 S. W. 798; P. v. White, 153 Mich. 617, 117 N. W. 161, 15 Det. Leg. N. 554, 17 L. R. A. (N. S.) 1102n, or opening a door with a key, S. v. Scripture, 42 N. H. 485; Lowder v. S., 63 Ala. 143, 146 will sustain an allegation of breaking in. The entrance must have been without the owner's consent and non-consent may be inferred from the circumstances. Van Walker v. S., 33 Tex. Cr. 359, 26 S. W. 507; S. v. Hayes, 105 Mo. 76, 84, 16 S. W. 514, 24 Am. St. 360. Theft by a person rightfully on the premises is larceny only. P. v. McCord, 76 Mich. 200, 42 N. W. 1106; Colvert v. S., 91 Ga. 705, 17 S. E. 840; P. v. Barry, 94 Cal. 481, 483, 29 P. 1026.

26. P. v. Gibson, 58 Mich. 368, 25 N. W. 316.

27. Rex v. Compton, 7 Car. & P. 139 (under 7 & 8 Geo. 4, c. 29, § 11); Conner v. S., 14 Mo. 561; Hobbs v. S., 44 Tex. 353; Martin v. S., 1 Tex. Ap. 525; S. v. Vierck, 23 S. D. 166, 120 N. W. 1098.

28. S. v. Morris, 27 La. Ann. 480; S. v. Maxwell, 42 Iowa, 208; S. v. Brower, 127 Ia. 687, 104 N. W. 284.

VI. *The Allegation and Proof of the Intent.*

§ 142. 1. **How Specific.**—Burglary being a breaking, etc., "with intent to commit a felony" in the place,[29] an indictment, whether upon the common law as thus defined,[30] or upon a statute in like terms,[31] is inadequate if it lays the intent only in these general words; it must specify the felony intended. And if it does, it need not say that the offense meant is a felony; for that is of law known to the court.[32] Yet the specification need not be so minute as in an indictment for its actual commission.[33] For example,—

2. **Where Larceny is intended,**—the kind, value,[34] or ownership[35] of the goods to be stolen need not be alleged. And—

3. **Where it is Rape[36] or Murder[37]**—the indictment is drawn on the like principle. Yet—

4. **To state the Name only of the Intended Felony**—as,

29. New Crim. Law, II, § 90; McNair v. S., 61 Fla. 35, 55 So. 401; S. v. Buchanan, 75 Miss. 349, 22 So. 875.

30. S. v. Lockhart, 24 Ga. 420.

31. Portwood v. S., 29 Tex. 47, 94 Am. D. 258; Wilburn v. S., 41 Tex. 237; Mason v. P., 26 N. Y. 200; S. v. Williamson, 3 Heisk. 483.

32. Mathews v. S., 36 Tex. 675; P. v. Nelson, 58 Cal. 104; S. v. Shelton, 90 Tenn. 539, 18 S. W. 253. And see Josslyn v. C., 6 Met. 236.

33. Ante, §§ 76, 77, 82, 84, 87; S. v. Henley, 30 Mo. 509; Coleman v. S., 2 Tex. Ap. 512; Houser v. S., 58 Ga. 78; Burke v. S., 5 Tex. Ap. 74 (which compare with Reg. v. Watkins, Car. & M. 264); Bradley v. S., 32 Ark. 704; S. v. Jennings, 79 Iowa, 513, 44 N. W. 799; Shotwell v. S., 43 Ark. 345; Territory v. Duncan, 5 Mont. 478, 6 P. 353; Womack v. S., 6 Lea, 146; Washington v. S., 17 Tex. Ap. 197; Jones v. S., 18 Fla. 889; Bigham v. S., 31 Tex. Cr. 244, 20 S. W. 577.

34. Hunter v. S., 29 Ind. 80; S. v. Jones, 10 Iowa, 206; Wicks v. S., 44 Ala. 398; Coleman v. S., 2 Tex. Ap. 512; Martin v. S., 1 Tex. Ap. 525; S. v. Beckworth, 68 Mo. 82. See West v. S., 35 Tex. 89; S. v. Yandle, 166 Mo. 589, 66 S. W. 532.

35. S. v. Clark, 42 Vt. 629, 633; P. v. Shaber, 32 Cal. 36; Reg. v. Lawes, 1 Car. & K. 62; McCarthy v. S., 90 Ark. 384, 119 S. W. 647; S. v. Golden, 86 Minn. 206, 90 N. W. 398.

36. P. v. Burns, 63 Cal. 614; Harvey v. S., 53 Ark. 425, 22 Am. St. 229, 14 S. W. 645; Burke v. S., 5 Tex. Ap. 74.

37. S. v. Newton, 30 La. Ann. 1253; Stinnett v. S., 32 Tex. Cr. 526, 24 S. W. 908; S. v. Queen, 91 N. C. 659.

"larceny"[38] or "rape"[39]—is by most judges deemed not sufficiently minute, though some hold it adequate.[40]

§ 143. Charging Felony as committed.—Another form[41] is to charge, for exampe, that the breaking and entering were with intent to commit a larceny in the place, and then proceed in the same count to aver a larceny actually committed there;[42] or, omitting the allegation of intent, to charge, in addition to the breaking and entering, simply the larceny.[43] This does not render the count double.[44] And the conviction may be for all or whatever part is proved.[45] What is defectively alleged will be rejected as surplusage.[46] In these cases,—

38. Lee v. S., 56 Ga. 477. And see Webster v. S., 9 Tex. Ap. 75; P. v. Bartley, 12 Cal. Ap. 773, 108 P. 868.

39. S. v. Williams, 41 Tex. 98.

40. P. v. Shaber, 32 Cal. 36; S. v. Tytus, 98 N. C. 705, 4 S. E. 29; Myers v. S., 92 Ind. 390. And see Wicks v. S., 44 Ala. 398; Pardue v. S., 4 Bax. 10; Stevenson v. S., 5 Bax. 681; Lanier v. S., 76 Ga. 304; P. v. Goldsworthy, 130 Cal. 600, 62 P. 1074; S. v. Watson, 102 Iowa, 651, 72 N. W. 283; S. v. Powell, 61 Kan. 81, 58 P. 968; Radley v. Com., 89 S. W. 519, 28 Ky. L. 477; S. v. Neddo, 92 Me. 71, 42 A. 253; S. v. Doran, 99 Me. 329, 59 A. 440, 105 Am. St. 278; S. v. Taylor, 136 Mo. 66, 37 S. W. 907; S. v. Ellsworth, 130 N. C. 690, 41 S. E. 548.

41. New Crim. Law, II, § 116.

42. 3 Chit. Crim. Law, 1117, 1119, 1120; Archb. Crim. Pl. & Ev. (19th Ed.) 536; Adams v. S., 55 Ala. 143; Manson v. S., 24 Ohio St. 590; S. v. Taylor, 136 Mo. 66, 37 S. W. 907.

43. Olive v. C., 5 Bush, 376. See S. v. Ryan, 12 Nev. 401, 28 Am. R. 802; Barber v. S., 78 Ala. 19; Struckman v. S., 7 Tex. Ap. 581. Contra, Wood v. S., 46 Ga. 322. In this case the court deemed that as the intent to steal is an essential element in the burglary, it must appear in allegation. None deny this proposition. But the ground on which the form stated in the text is upheld is that the actual stealing involves the intent to steal, and a charge of the fact is, among the rest, a charge of the intent.

44. Vol. I, § 439; Rex v. Hungerford, 2 East P. C. 518; C. v. Tuck, 20 Pick. 356; C. v. Hope, 22 Pick. 1; S. v. Henley, 30 Mo. 509; Reg. v. Andrews, Car. & M. 121; S. v. Hayden, 45 Iowa, 11; Snow v. S., 54 Ala. 138. See P. v. Smith, 86 Cal. 238. For a special combination of burglary, larceny, and receiving, see S. v. Woodard, 38 S. C. 353. For other similar things, S. v. Ely, 35 La. Ann. 895; Harris v. P., 44 Mich. 305, 6 N. W. 677.

45. Ib.; Vol. II, § 1037, note; New Crim. Law, II, § 116 (2, 3); Vaughan v. C., 17 Grat. 576; Manson v. S., 24 Ohio St. 590. See Ex parte Peters, 2 McCrary, 403.

46. Larned v. C., 12 Met. 240; S. v. Bartlett, 55 Me. 200. See Byrnes v. P., 37 Mich. 515.

§ 144. **Sentence.**—In reason, since the breaking with intent and the actual stealing do not, when charged in one count, render it double, the sentence on conviction for the whole so charged can be only for burglarly, or for larceny, not for both; and accordingly the adjudications are that, when so charged, it can be only for burglary,[47] though it may be for both when the two are in separate counts;[48] and, by some, even when in one count.[49] In the latter case, the sentence would not be bad on error if either way.[50] In Missouri, by statute, whether there are two counts or only one, the defendant on conviction for the whole "shall be punished by imprisonment in the penitentiary, in addition to the punishment heretofore prescribed for the burglary, not exceeding five years."[51]

§ 145. **The Common Form**—of charging the intent is to say, for example, "with intent the goods and chattels *of one* [*or* the said] *B*[52] in the said dwelling-house then and there being, [then and there[53]] feloniously and burglariously to steal, take, and carry away."[54] But—

§ 146. 1. **Under Statutes**—further expansions of the al-

47. New Crim. Law, I, § 1062; Breese v. S., 12 Ohio St. 146, 80 Am. D. 340; Roberts v. S., 55 Miss. 421; S. v. Wilson, 59 N. H. 139.

48. New Crim. Law, ut sup. But, in Iowa, see S. v. McFarland, 49 Iowa, 99. And see McCollough v. S., 132 Ind. 427, 31 N. E. 1116.

49. S. v. McClung, 35 W. Va. 280, 13 S. E. 654. And see C. v. Lowery, 149 Mass. 67, 20 N. E. 697.

50. Vol. II, §§ 1325-1328; Crowley v. C., 11 Met. 575; Kite v. C., 11 Met. 581. See C. v. Hope, 22 Pick. 1.

51. S. v. Smith, 16 Mo. 550; S. v. Henley, 30 Mo. 509. And see S. v. Butterfield, 75 Mo . 297; S. v. Bruffey, 11 Mo. Ap. 79; S. v. Brown, 73 Mo. 631; Toliver v. S., 35 Ark. 395.

52. As the words "of one B" are unnecessary (ante, § 142 (2), it is practically better to omit them; because, if inserted, they must be proved. Rex v. Jenks, 2 Leach, 774.

53. Not necessary, C. v. Doherty, 10 Cush. 52, 54.

54. 3 Chit. Crim. Law, 1119; to the like effect, Archb. Crim. Pl. & Ev. (19th Ed.) 536; S. v. Jones, 10 Iowa, 206; Josslyn v. C., 6 Met. 236. And see Dawson v. S., 65 Ind. 442; Sullivan v. S., 13 Tex. Ap. 462; S. v. Fox, 80 Iowa, 312, 20 Am. St. 425, 45 N. W. 874. Where the purpose of the burglary is **Rape**, see Bradley v. S., 32 Ark. 704; where **Rescue**, S. v. Abbott, 16 N. H. 507; where **Arson**, Pairo v. S., 49 Ala. 25.

legation of the intent may be required; as, by stating the value of the goods to be stolen where petit larceny is only misdemeanor,[55] an averment not necessary where it is felony.[56] So also, where the intended felony is alleged descriptively, not by its name, the description must be so full and accurate as to make its criminal quality and its conformity to statutory terms appear.[57] And—

2. **No Variance**—must occur between allegation and proof.[58] Thus,—

§ 147. 1. **Instances of Variance.**—An allegation of intent to steal the goods of a person named is not sustained by proof that the goods belong to another;[59] while, if it were silent as to ownership,[60] none need be proved.[61] There was a variance [62] "where the intent laid was to kill a horse, and the intent proved was merely to lame him in order to prevent him from running a race;" [63] also, where murder was the intent averred, and that proved was to beat the party.[64] "Where the intent laid was to steal, and the intent proved was to carry away the defendant's trunk containing money which he had formerly embezzled from his master, it was holden that the offense proved did not amount to a burglary; for it was no felony in the defendant to remove the money.[65] So, where the intent laid was

55. P. v. Murray, 8 Cal. 519. And see Wood v. S., 18 Fla. 967; P. v. Hall, 94 Cal. 595, 30 P. 7; S. v. Anderson, 5 Wash. 350.

56. Spencer v. S., 13 Ohio, 401; Spears v. S., 2 Ohio St. 583; Boose v. S., 10 Ohio St. 575; C. v. Williams, 2 Cush. 582; S. v. Shelton, 90 Tenn. 539, 18 S. W. 253; Collins v. S., 20 Tex. Ap. 197. See Simms v. S., 2 Tex. Ap. 110; Conoly v. S., 2 Tex. Ap. 412.

57. Pairo v. S., 49 Ala. 25; Rex v. Monteth, 2 Leach, 702; O'Brien v. S., 27 Tex. Ap. 448; Buntain v. S., 15 Tex. Ap. 485.

58. Reg. v. Powell, 2 Den. C. C. 403, 5 Cox C. C. 396; S. v. Fisher, 1 Penn. (Del.) 303, 41 A. 208.

59. Rex v. Jenks, 2 Leach, 774, 2 East, P. C. 514; Neubrandt v. S., 53 Wis. 89, 9 N. W. 824; Black v. S., 18 Tex. Ap. 124; Polk v. S., 60 Tex. Cr. Ap. 462, 132 S. W. 134.

60. Ante, §§ 142 (2), 145, note.

61. Reg. v. Clarke, 1 Car. & K. 421.

62. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 308.

63. Rex v. Dobbs, 2 East, P. C. 513.

64. 1 Hale, P. C. 561.

65. Rex v. Dingley, cited 2 Leach, 841.

to steal, and the intent proved was to rescue uncustomed goods which had been seized, the judges held that the indictment was not sustained by the evidence."[66] Mortgage deeds are *choses in action,* not "goods and chattels;" hence an allegation of intent to steal the latter is not sustained by proof of an intent to steal the former.[67] And, generally,—

2. **Whatever Intent is averred**—must be proved;[68] it is a question of fact for the jury.[69] A charge that the intent

66. Rex v. Knight, 2 East, P. C. 510.

67. Reg. v. Powell, 2 Den. C. C. 403, 5 Cox, C. C. 396.

68. Ashford v. S., 36 Neb. 38; Coleman v. S., 26 Tex. Ap. 252; P. v. Mulkey, 65 Cal. 501, 4 P. 507; S. v. Anderson, 5 Wash. 350, 31 P. 969; P. v. Curley, 99 Mich. 238, 58 N. W. 68; Alexander v. S., 31 Tex. Cr. 359, 20 S. W. 756; S. v. Powell, 94 N. C. 965; Harris v. S., 20 Tex. Ap. 652; Hammons v. S., 29 Tex. Ap. 445; Robinson v. S., 53 Md. 151, 36 Am. R. 399; C. v. Moore, 130 Mass. 45; S. v. Meche, 42 La. Ann. 273, 7 So. 573; Davis v. S., 22 Fla. 633; S. v. Queen, 91 N. C. 659.

69. P. v. Griffin, 77 Mich. 585, 43 N. W. 1061; Steadman v. S., 81 Ga. 736, 8 S. E. 420; Burrows v. S., 84 Ind. 529; S. v. McBryde, 97 N. C. 393, 1 S. E. 925; P. v. Soto, 53 Cal. 415; Walton v. S., 29 Tex. Ap. 163. An intent to commit a specific felony may be inferred from the fact that the felony was committed. Stokes v. S., 84 Ga. 258, 263, 10 S. E. 740; S. v. Wilkes, 82 S. C. 163, 63 S. E. 688; Vance v. Com. (Ky.), 115 S. W. 774; Jenkins v. S., 58 Fla. 62, 50 So. 582. It may be reasonably inferred from the fact that the accused induced. Wright v. Com., 82 Va. 183, 187; Nightengale v. S., 50 Tex. Cr. 3, 95 S. W. 531; Gunter v. S., 79 Ark. 432, 96 S. W. 181, 116 Am. St. 85; S. v. Raphael, 123 Ia. 452, 99 N. W. 151, 101 Am. St. 334; P. v. Lang, 142 Cal. 482, 76 P. 232; Kennedy v. S., 71 Neb. 765, 99 N. W. 645, or attempted to induce, P. v. Calvert, 22 N. Y. S. 220, 67 Hun, 649, the custodian of the building to absent himself. That the accused entered the building after dark, S. v. Fox, 80 Ia. 312, 45 N. W. 874, 20 Am. St. 425; and was found there with burglar's tools or keys in his possession, Taylor v. S., 52 Tex. Cr. 190, 107 S. W. 58; P. v. Morton, 4 Utah, 407, 408, 11 P. 512; S. v. Christmas, 101 N. C. 740, 756, 8 S. E. 361; or was discovered committing larceny therein, S. v. Anderson, 5 Wash. St. 350, 31 P. 969; Clifton v. S., 26 Fla. 523, 25, 7 So. 863, or attempted to escape or conceal himself, Alexander v. S., 31 Tex. Cr. 359, 362, 20 S. W. 756; P. v. Hagan, 14 N. Y. S. 233, 60 Hun (N. Y.), 577, is always relevant. The accused may always explain his presence in the house. P. v. Griffin, 77 Mich. 585, 587, 43 N. W. 1061; S. v. Perry, 124 La. 931, 50 So. 799.

was to commit larceny is sustained by proof of an intent to rob; since the latter includes the former.[70]

§ 148. Felony committed.—One is presumed to mean what he does.[71] Therefore, in general, if he is charged simply with intending to commit a felony in the place entered, and the proof is that he did commit it, the allegation is sustained.[72] No evidence could be more satisfactory. Yet in reason this would not be necessarily so if the intent averred was to commit murder or manslaughter, and it was shown to have been committed; because one may become guilty of this sort of offense without meaning it. And there are other felonies of the like kind.[73]

§ 149. 1. The Forms of the Evidence—are without limit; and in some way the prosecuting power must make good against the defendant the whole issue,[74] including the intent.[75] Thus,—

2. **Where Rape is the Felony intended,**—the effect of the violence on the woman,[76] the grasping of her ankle while asleep in bed, her screaming,[77] and her subsequent complaint, limited as on a trial for rape itself,[78] are examples of what is competent.

§ 150. More than One Felony meant.—Where the breach and entry are with intent to commit distinct felonies,—

70. P. v. Crowley, 100 Cal. 478, 35 P. 84; Allen v. S., 12 Lea, 424. Contra, Miller v. S., 28 Tex. Ap. 445.

71. Vol. II, § 1099 (2).

72. New Crim. Law, II, § 115; Rex v. Locost, J. Kel. 30; P. v. Marks, 4 Par. Cr. 153, 154; Allen v. S., 12 Lea, 424; S. v. McKnight, 111 N. C. 690, 16 S. E. 319; S. v. Hackett, 47 Minn. 425, 28 Am. St. 380, 50 N. W. 472; Wright v. C., 82 Va. 183; S. v. Woods, 31 La. Ann. 267.

73. As seemingly dissenting from this whole doctrine, especially as to the form of the indictment, see Reeves v. S., 7 Tex. Ap. 276. See also Reg. v. Clarke, 1 Car. & K. 421.

74. Vol. II, § 1052 et seq.; Adams v. S., 31 Ohio St. 462; Parks v. S., 66 Ga. 192; P. v. Schoeneth, 44 Mich. 489, 7 N. W. 70; C. v. Shedd, 140 Mass. 451, 5 N. E. 254.

75. Vol. II, § 1101; P. v. Marks, 4 Par. Cr. 153; S. v. Cowell, 12 Nev. 337; S. v. Johnson, 38 La. Ann. 686, 688. And see cases cited ante, § 147 (2).

76. C. v. Doherty, 10 Cush. 52.

77. S. v. Boon, 13 Ire. 244, 57 Am. D. 555.

78. S.v. Gruso, 28 La. Ann. 952.

as, rape, larceny, and murder,—there is but one burglary. On principle, therefore, the indictment may, and for convenience it practically should, charge the whole in one count.[79] Hence, if the pleader doubts what felony was intended, he may lay in one count all the probable ones, and proof of any one will suffice. Still the common course seems to have been to put this matter into separate counts, —a method not legally objectionable.[80]

§ 151. 1. **Assuming the Corpus Delicti**—to have been proved,[81]—

2. **Burglars' Tools,**—found on the defendant's person, in his dwelling, or otherwise in his possession, may, to connect him with the offense, be produced,[82] with a showing of the attending circumstances.[83] Even those not adapted to the particular burglary may be exhibited when found with those which are.[84] Also,—

§ 152. **The Goods Stolen**—in a burglary, as connecting the defendant with the *corpus delicti*,[85] his recent posses-

79. Vol. I, §§ 434, 437; ante, § 93.

80. Archb. Crim. Pl. & Ev. (19th Ed.) 536; 3 Chit. Crim. Law, 1114; Rex v. Thompson, 2 East, P. C. 515, 2 Leach, 1105, note.

81. Vol. II, §§ 1056-1060; Williams v. P., 196 Ill. 173, 63 N. E. 681; McCoy v. S., 48 Tex. Cr. 30, 85 S. W. 1072; S. v. Clark, 85 S. C. 273, 67 S. E. 300. This evidence is strengthened if it be shown that the tools were used. P. v. Winters, 29 Cal. 658; P. v. Hope, 62 Cal. 291; P. v. Wilson, 7 Ap. Div. (N. Y.) 326, 40 N. Y. S. 117, 2 Am. St. 397; Russell v. S. (Ala. 1905), 38 So. 291; S. v. Wayne, 62 Kan. 636, 64 P. 69.

82. Vol. II, § 965 (1); S. v. Ellwood, 17 R. I. 763; S. v. Clark, 85 S. C. 273, 67 S. E. 300. Indictment for possession of burglar's tools. Com. v. Conlin, 188 Mass. 282, 74 N. E. 351; S. v. Erdlen, 127 Iowa, 620, 103 N. W. 984.

83. P. v. Winters, 29 Cal. 658; P. v. Larned, 3 Seld. 445; S. v. Harrold, 38 Mo. 496; S. v. Rand, 33 N. H. 216. And see Clark v. P., 5 Thomp. & C. 33; P. v. Clark, 2 Hun, 520; Foster v. P., 3 Hun, 6; P. v. Gregory, 130 Mich. 522, 90 N. W. 414, 9 Det. Leg. N.; P. v. Jefferson, 161 Mich. 621, 126 N. W. 829; Sorenson v. U. S., 94 C. C. A. 181, 168 F. 785.

84. C. v. Williams, 2 Cush. 582. And see C. v. Day, 138 Mass. 186; S. v. Tazwell, 30 La. Ann. 884; Grimes v. S., 77 Ga. 762, 4 Am. St. 112.

85. Fuller v. S., 48 Ala. 273; Johnson v. C., 29 Grat. 796; Brown v. S., 59 Ga. 456; Frank v. S., 39 Miss. 705; Walker v. C., 28 Grat.

sion of them, whether charged in the indictment to have been stolen or not,[86] the circumstances of the possession and how far he accounted therefor may be shown. We shall see [87] that in cases of pure larceny, opinions are not quite uniform upon the effect of this evidence; it is the same [88] in burglary. The question is much influenced by the facts special to the particular case.[89] In reason, the

969; Boswell v. S., 92 Ga. 581, 17 S. E. 805; P. v. Lowery, 70 Cal. 193; S. v. Brady (Ia.), 91 N. W. 801; S. v. Brower, 127 Ia. 687, 104 N. W. 284.

86. C. v. McGorty, 114 Mass. 299; Hall's Case, 3 Grat. 593; Foster v. P., 63 N. Y. 619; S. v. Short (Del.), 75 A. 787; S. v. Cole (Del.), 78 A. 1025; P. v. McDonald, 163 Mich. 552, 128 N. W. 737; P. v. Trine, 164 Mich. 1, 129 N. W. 3, 17 Det. Leg. N. 1013; Roberts v. S., 59 Tex. Cr. Ap. 47, 129 S. W. 611; Diseren v. S., 59 Tex. Cr. Ap. 149, 127 S. W. 1038.

87. Post, §§ 739-746.

88. But see Taliaferro v. C., 77 Va. 411; S. v. Shaffer, 59 Iowa, 290, 13 N. W. 306.

89. Knickerbocker v. P., 43 N. Y. 177; P. v. Boujet, 2 Par. Cr. 11; S. v. Reid, 20 Iowa, 413; Houser v. S., 58 Ga. 78; Billinglea v. S., 56 Ga. 686; Methard v. S., 19 Ohio St. 363, 368; Reg. v. Farr, 4 Fost. & F. 336; P. v. Beaver, 49 Cal. 57; Walker v. C., supra; Walker v. S., 58 Ala. 393; S. v. Owsley, 111 Mo. 450, 20 S. W. 194; Wright v. C., 82 Va. 183, — S. E. —; S. v. Jones, 19 Nev. 365; Ryan v. S., 83 Wis. 486; Trent v. S., 31 Tex. Cr. 251, 20 S. W. 547; Van Walker v. S., 33 Tex. Cr. 359, 26 S. W. 507; S. v. Owens, 79 Mo. 619; P. v. Wood, 99 Mich. 620, 58 N. W. 638; Brown v. S., 59 Ga. 456; S. v. Tilton, 63 Iowa, 117, 18 N. W. 716; Lundy v. S., 71 Ga. 360; Dawson v. S., 32 Tex. Cr. 535, 40 Am. St. 791, 25 S. W. 21; Shropshire v. S., 69 Ga. 273; P. v. Gordon, 40 Mich. 716; Brown v. S., 61 Ga. 311; P. v. Mitchell, 55 Cal. 236; Stuart v. P., 42 Mich. 255, 3 N. W. 863; Harris v. S., 61 Miss. 304; Sullivan v. S., 18 Tex. Ap. 623; Ross v. S., 16 Tex. Ap. 554; Davis v. S., 76 Ga. 16; Tilly v. S., 21 Fla. 242; S. v. Riyers, 68 Iowa, 611, 27 N. W. 781; Dodson v. S., 86 Ala. 60, 5 So. 485; Sahlinger v. P., 102 Ill. 241; P. v. Carroll, 54 Mich. 334, 20 N. W. 66; S. v. Robinson, 35 S. C. 340, 14 S. E. 766; Jackson v. S., 28 Tex. Ap. 370, 19 Am. St. 839, 13 S. W. 451; P. v. Joy, 135 Cal. 19, 66 P. 964; P. v. Wieland, 10 Cal. Ap. 519, 102 P. 828. See P. v. O'Donnell, 16 Cal. Ap. 716, 117 P. 933; Thompson v. S., 58 Fla. 106, 50 So. 507; Gravitt v. S., 114 Ga. 841, 40 S. E. 1003; Peterson v. S., 6 Ga. Ap. 49, 65 S. E. 311; Williams v. P., 196 Ill. 173, 63 N. E. 681; P. v. Everett, 242 Ill. 628, 90 N. E. 226; S. v. Brundidge, 118 Ia. 92, 91 N. W. 920; S. v. Wilson, 137 Mo. 592, 39 S. W. 80; S. v. Yandle, 166 Mo. 589, 66 S. W. 532; S. v. Sparks, 40 Mont. 82, 105 P. 87; Considine v. U. S., 50 C. C. A. 272, 112 F. 342. A few cases permit burglary to be presumed from possession of

jury, not the court, should determine what this evidence proves. And there are cases which so hold.[90]

§ 153. 1. **Other Evidence**—may assume varying forms;[91] as,—

2. **Another Breaking**—may be so connected with the one complained of as to be admissible in explanation of it.[92] Or—

stolen goods. Com. v. Millard, 1 Mass. 6; S. v. Toohey, 203 Mo. 674, 102 S. W. 530; Scott v. S., 122 Ga. 138, 50 S. E. 49; S. v. James, 194 Mo. 268, 92 S. W. 679. The majority of the cases however, hold that possession creates no presumption of burglary but that the breaking in and entering must be proved by other evidence and that possession is a mere circumstance in the case. King v. S., 99 Ga. 686, 26 S. E. 480; S. v. Conway, 56 Kan. 682, 44 P. 627; Metz v. S., 46 Neb. 547, 65 N. W. 190; S. v. Ham, 98 Ia. 60, 66 N. W. 1038; Porterfield v. Com., 91 Va. 801, 22 S. E. 352; S. v. Blue, 136 Mo. 41, 37 S. W. 796; S. v. Wilson, 137 Mo. 592, 39 S. W. 80; S. v. Jennings, 79 Ia. 513, 44 N. W. 799; Neubrandt v. S., 53 Wis. 89, 90, 9 N. W. 824; P. v. Carroll, 54 Mich. 334, 20 N. W. 66; P. v. Wood, 99 Mich. 620, 58 N. W. 638; Brooks v. S., 96 Ga. 353, 23 S. E. 413; S. v. Rights, 82 N. C. 675, 678; Magee v. P., 139 Ill. 138, 28 N. E. 1077; Gravely v. Com., 86 Va. 396, 401, 403, 10 S. E. 431; Ryan v. S., 83 Wis. 486, 53 N. W. 836; Collier v. S., 55 Fla. 7, 45 So. 752; S. v. Hullen, 133 N. C. 656, 45 S. E. 513; S. v. Peach, 70 Vt. 283, 40 A. 732; S. v. Toohey, 203 Mo. 674, 102 S. W. 530; S. v. Beeman, 51 Wash. 557, 99 P. 756; Cuthbert v. S., 3 Ga. Ap. 600, 60 S. E. 322; S. v. Brady, 121 Iowa, 561, 97 N. W. 62.

90. S. v. Hodge, 50 N. H. 510, 526; Prince v. S., 44 Tex. 480; Stockman v. S., 24 Tex. Ap. 387, 5 Am. St. 894; Gravely v. C., 86 Va. 396, 10 S. E. 431; Bryan v. S., 62 Ga. 179; Spencer v. S. (Tex. Cr. Ap. 1911), 133 S. W. 1049.

91. S. v. Munson, 7 Wash, 239; Goldsmith v. S., 32 Tex. Cr. 112, 22 S. W. 405; Boswell v. S., 92 Ga. 581, 17 S. E. 805; Garrity v. P., 107 Ill. 162; Stewart v. S., 63 Ala. 199; Frazier v. S., 135 Ind. 38, 84 N. E. 817; Bromley v. P., 150 Ill. 297, 37 N. E. 209; S. v. Warford, 106 Mo. 55, 27 Am. St. 322, 16 S. W. 886; S. v. Kepper, 65 Iowa, 745, 23 N. W. 304; Fort v. S., 52 Ark. 180, 20 Am. St. 163, 11 S. W. 959; Bluitt v. S., 12 Tex. Ap. 39, 41 Am. R. 666; S. v. Clary, 24 S. C. 116; Jackson v. S., 49 Fla. 3, 38 So. 599; S. v. Horn, 209 Mo. 452, 108 S. W. 3.

92. Osborne v. P., 2 Par. Cr. 583; Reg. v. Cobden, 3 Fost. & F. 833, 651-589. See S. v. Adams, 20 Kan. 311; Vol. II, §§ 1120-1129; Frazier v. S., 135 Ind. 38, 40, 34 N. E. 817; S. v. Robinson, 35 S. C. 340, 14 S. E. 766; S. v. Weldon, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 126n; P. v. Mead, 50 Mich. 228, 15 N. W. 95; Eley v. S. (Tex. 1890), 13 S. W. 998; S. v. Morgan, 129 La. 154, 55

3. **Evidence of a Conspiracy,**—and what one conspirator said or did, is admissible in this offense the same as in others.[93]

4. **Other Combinations of Defendants**—come within the familiar rules.[94]

So. 747. Same building two nights before. Mulligan v. Com., 144 Ky. 246, 137 S. W. 1062.

93. Vol. II, § 1248; C. v. Scott, 123 Mass. 222, 25 Am. R. 81; Mason v. S., 42 Ala. 532; Ryan v. S., 83 Wis. 486, 53 N. W. 836. See S. v. Adams, 20 Kan. 311.

94. S. v. Hayes, 105 Mo. 76, 24 Am. St. 360, 16 S. W. 514; Gale v. S., 13 Lea, 489; Jackson v. S., 28 Tex. Ap. 143; S. v. Learnard, 41 Vt. 585; Swan v. C., 104 Pa. 218; Fort v. S., supra; P. v. Dow, 64 Mich. 717, 8 Am. St. 873, 31 N. W. 597.

For Burial, see Sepulture; Burning Buildings, see Arson and other Like Burnings; Carnal Abuse, see Rape and the like. Also, Stat. Crimes, §§ 478-499. Carrying Weapons, as to both law and procedure, see Stat. Crimes; Challenging, see Duelling.

CHAPTER CVI.

CHAMPERTY AND MAINTENANCE.

Consult—for the law of these offenses, New Crim. Law, II, §§ 121-140; Stat. Crimes, § 232. And compare with BARRATRY. For the indictment, etc., Dir. & F., §§ 269, 270; Vol. II, § 530 (2).

§ 154. **Form of Indictment.**—Maintenance so far includes champerty that the indictment for the one will indicate how the other should be. Chitty's form for maintenance avers that at a time and place stated, the defendant "did unjustly and unlawfully maintain and uphold a certain suit which was then depending in the court [describing it], contrary to the form of the statute in such case made and provided, and to the manifest hindrance and disturbance of justice, and in contempt, etc., to the great damage [95] of the said X, and against the peace, etc." [96]

§ 155. **"Against Form of Statute."**—"Maintenance," says Chitty,[97] "is an offense at common law,[98] and further prohibited, on pain of fine and imprisonment, by 1 Edw. 3, c. 14." [99] As, if this statute is of force in this country, it is here common law, this conclusion would seem needless with us, whether required in England or not; except when the indictment is on a statute of the State.

§ 156. **Sufficiency otherwise.**—There is reason for doubt whether it is sufficient simply to say, as in the above form, that the defendant "did unjustly and unlawfully maintain and uphold" the suit.[1] The forms in Tremaine [2] are, in this, somewhat more minute.

95. Needless Vol. II, § 649 (1).

96. 2 Chit. Crim. Law, 234. This is substantially the form in Burn. Just. tit. Maintenance. For forms somewhat more elaborate, see Rex v. Langrish, Trem. P. C. 176; Rex v. Price, Trem. P. C. 177.

97. 2 Chit. Crim. Law, 234, note.

98. 1 Hawk, P. C. (Curw. Ed.) p. 462, § 38.

99. Referring also to 20 Edw. 3, c. 4, 1 Rich. 2, c. 4; 32 Hen. 8, c. 9.

1. See ante, § 17 et seq.

2. Ante, § 154, note.

CHAPTER CVII.

CHEATS AND FALSE PRETENCES.

Consult—for direct expositions of the law of Common law Cheat, New Crim. Law, II, §§ 141-168; of Statutory False Pretences, Ib., §§ 409-488. Collateral, as to both, see the indexes under the several titles "Cheats" and "False Pretences;" and consult Stat. Crimes as to both. For the indictment, etc., for the Common law Cheat, Dir. & F., §§ 271-277; for False Pretences, Ib., §§ 418-434. For various further questions of procedure, consult the indexes to the present volumes.

§ 157. 1. **In this Volume,**—contrary to the course in "New Criminal Law," the procedure both for the common law cheat and for statutory false pretenses is for convenience treated together in a single chapter.

2. **How Chapter divided.**—We shall consider, I. The Indictment for the Common law Cheat; II. The Indictment for Statutory False Pretences; III. The Evidence; IV. The Procedure for the Attempt; V. Questions of Practice.

I. *The Indictment for the Comomn Law Cheat.*

§ 158. 1. **In Directions and Forms,**—this subject is pretty fully explained, and various forms for the indictment are given.[3]

2. **In Principle, and by the Combined Authorities,**—the several elements of the offense must be alleged, and with due particularity; namely, the symbol or token, set out in a manner to appear on the face of the averment to be of

3. Dir. & F. §§ 271-277.

the indictable sort, how it was addressed to the person operated upon, and how it accomplished a fraud, and what fraud.[4] Or if the defendant did not succeed in what he undertook, the indictment may stop short and show a punishable attempt.[5]

§ 159. 1. **Specific.**—In an indictment for selling beer without paying duty, it was adjudged too general to say that the defendant thus disposed of "divers quantities." But the charge that the sale was made to "divers liege subjects of the king" was sustained; because "the informer may not know the name of the person;" and, it was added, an "indictment for the murder of a person unknown is good." [6] Whence we infer that where the name is known, it must be set out; and so it has been held on an indictment for selling by false weights,—"to divers persons" not being sufficient.[7]

2. **The Token,**—it appears, need only be described with such minuteness as to bring it affirmatively within the law.[8]

§ 160. **"Common Cheat."**—To allege simply that the defendant is a "common cheat," specifying no acts, is inadequate.[9]

§ 161. **Averment and Proof**—must correspond; as, where

4. New Crim. Law, II, §§ 143-160.

5. New Crim. Law, II, § 168; post, §§ 194-196. And see, for forms, Matthews Crim. Law, 472; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 296; Reg. v. Orbell, 6 Mod. 42; Reg. v. Vreones, 1891, 1 Q. B. 360; Rex v. Worrell, Trem. P. C. 106; Reg. v. Eagleton, Dears, 376; P. v. Fish, 4 Par. Cr. 206; Rex v. Bonny, Trem. P. C. 106; Rex v. Edwards, Trem. P. C. 103; Rex v. Saunders, Trem. P. C. 100; Rex v. Taydler, Trem. P. C. 94; Rex v. Betsworth, Trem. P. C. 93; Rex v. Arnope, Trem. P. C. 91; Rex v. Govers, Say, 206; Rex v. Bower, Cowp. 323. And see further, as to the form. S. v. Boon, 4 Jones (N. C.), 463; U. S. v. Warner, 26 Fed. Rep. 616; Tatum v. S., 58 Ga. 408.

6. Rex v. Gibbs, 1 Stra. 497, 8 Mod. 58. See Vol. II, §§ 545-553.

7. S. v. Woodson, 5 Humph. 55, And see P. v. Fish, 4 Par. Cr. 206.

8. S. v. Woodson, supra; S. v. Boon, 4 Jones (N. C.) 463. And see this case as to other ingredients of the offense. S. v. Baker, 57 Kan. 541, 46 P. 947.

9. Vol. II, § 530 (2); S. v. Johnson, 1 D. Chip. 129; Reg. v. Hannon, 6 Mod. 311.

the cheating was charged to be in an executed contract, and the evidence showed an executory one, which was abandoned before consummation, the variance was fatal.[10]

II. *The Indictment for Statutory False Pretenses.*

§ 162. **Being upon a Statute,**—the indictment must conform to its particular terms; varying with them, and following in all other respects the rules for statutory indictments given in the preceding volume.[11] Still,—

§ 163. 1. **In Fundamentals,**—while the statutory words differ, the elements of the offense defined by them are substantially the same in all. So that—

2. **The Allegations,**—to cover those elements, must set out the pretence or pretences, charge them to be false, known by the defendant to be so, made to a person named to defraud him or another, by means whereof he obtained from the defrauded person some specified thing of value of a sort included in the statutory inhibition. Herein the statutory words and phrases should be employed, and the facts be given with such minuteness and directness as to satisfy the common-law rules of criminal pleading.[12] And—

10. S. v. Corbett, 1 Jones (N. C.) 264. And see ante, § 120; post, § 260.

11. Vol. II, § 593 et seq. S. v. Lynn, 3 Pen. (Del.) 316, 51 A. 878; Brunaugh v. S., 173 Ind. 483, 90 N. E. 1019. Such a statute is strictly construed. S. v. Brown, 143 Wis. 405, 127 N. W. 956.

12. See, for example, Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 289; Reg. v. Giles, Leigh & C. 502; S. v. Locke, 35 Ind. 419; Baker v. S., 31 Ohio St. 314; Reg. v. Bowen, 13 Q. B. 790; Hamilton v. Reg., 2 Cox C. C. 11, 9 Q. B. 271; Oliver v. S., 37 Ala. 134; C. v. Hulbert, 12 Met. 446; Reg. v. Kerrigan, Leigh & C. 383, 9 Cox C. C. 441; Rex v. Airey, 2 East, 30; Mathews v. S., 10 Tex. Ap. 279; P. v. Sully, 5 Par. Cr. 142; Maley v. S., 31 Ind. 192; S. v. Call, 48 N. H. 126; White v. S., 3 Tex. Ap. 605; S. v. Scott, 48 Mo. 422; S. v. Pritchard, 35 Conn. 319; S. v. Pryor, 30 Ind. 350; Todd v. S., 31 Ind. 514; S. v. Dowe, 27 Iowa, 273, 1 Am. R. 271; Owens v. S., 83 Wis. 496, 53 N. W. 736; Barton v. P., 135 Ill. 405, 25 Am. St. 375, 25 N. E. 776; C. v. Drew, 153 Mass. 588, 27 N. E. 593; Reg. v. Gordon, 23 Q. B. D. 354, 16 Cox C. C. 622; C. v. Lee, 149 Mass. 179, 21 N. E. 299; Reg. v. Kelleher, 14 Cox C. C. 48; C. v. Howe, 132 Mass. 250; S. v. Williams, 103 Ind. 235, 2 N. E. 585;

§ 164. **"Contrary to Statute."**—There must be the conclusion "contrary to the form of the statute."[13] Thus,—

§ 165. First. *Specifying the Pretences*:—

The Words "False Pretences"—are not alone sufficient in allegation; the particular pretences must be specified,[14] both as notice to the defendant of what he is to answer to,[15] and as enabling the court to discern their indictable quality.[16] And if in the particular case anything else is essential to the latter purpose. it must be stated.[17]

§ 166. 1. **Sufficient in Law**—must be the pretense set out; for example, it must be of an existing fact, not a promise.[18] And it must be stated in a form direct, not argumen-

Freeman v. S., 20 Tex. Ap. 558; Jones v. S., 22 Fla. 532; C. v. Stevenson, 127 Mass. 446; S. v. Porter, 75 Mo. 171; S. v. Dowd, 95 Mo. 163, 8 S. W. 7; S. v. Bradley, 48 Conn. 535; Wagoner v. S., 90 Ind. 504; S. v. Eason, 86 N. C. 674; S. v. Dickson, 88 N. C. 643; P. v. Oyer and Terminer Court, 83 N. Y. 436; Redmond v. S., 35 Ohio St. 81; S. v. Bradley, 68 Mo. 140; S. v. Smallwood, 68 Mo. 192; S. v. Holmes, 82 N. C. 607; S. v. Lambeth, 80 N. C. 393; S. v. Paul, 69 Me. 215; S, v. McConkey, 49 Iowa, 499; P. v. Higbie, 66 Barb. 131; S. v. Crooker, 95 Mo. 389, 8 S. W. 422; Mathena v. S., 15 Tex. Ap. 473; Allen v. S., 16 Tex. Ap. 150; S. v. Janson, 80 Mo. 97; Hirshfield v. S., 11 Tex. Ap. 207; Gregg v. P., 98 Ill. Ap. 170; Smith v. Com., 141 Ky. 534, 133 S. W. 228; Coblentz v. S., 84 Ohio, 235, 95 N. E. 768; S. v. Hubanks (Miss. 1911), 56 So. 163; S. v. Van Gunten, 84 Ohio, 177, 95 N. E. 662; S. v. Lichliter, 95 Mo. 402, 8 S. W. 720; S. v. Clay, 100 Mo. 571, 13 S. W. 821; P. v. Moran, 161 N. Y. 657, 57 N. E. 1120.

13. Reg. v. Walker, 10 U. C. Q. B. 465.

14. Rex v. Mason, 2 T. R. 581, 1 Leach, 487; Rex v. Munoes, 7 Mod. 315; s. c. nom. Rex v. Munoz, 2 Stra. 1127; Burrow v. S., 7 Eng. 65; Glackan v. C., 3 Met. Ky. 232; Hamilton v. S., 16 Fla. 288; C. v. Frey, 50 Pa. 245; Warrington v. S., 1 Tex. Ap. 168; C. v. Bracken, 14 Phila. 342; S. v. Switzer, 63 Vt. 604, 25 Am. St. 789, 22 A. 724. But see S. v. Joaquin, 43 Iowa, 131; S. v. Phelps, 41 Wash. 470, 84 Pa. 24.

15. Vol. II, §§ 517-531.

16. March v. P., 7 Barb. 391; S. v. Lambeth, 80 N. C. 393, 395; S. v. Dyer, 41 Tex. 520; Fuller's Case, 2 East P. C. 837; Du Brul v. S., 85 Ohio, 52, 87 N. E. 837.

17. Bonnell v. S., 64 Ind. 498.

18. New Crim. Law, II, § 415-428; Parker v. S., 98 Ark. 575, 137 S. W. 253; S. v. Ferris, 171 Ind. 562, 86 N. E. 993; S. v. Mullen, 151 Ia. 392, 131 N. W. 679; McDowell v. Com., 136 Ky. 8, 123 S. W. 313; or an opinion, S. v. Marion, 235 Mo. 359, 138 S. W. 491; P. v. Miller,

tative.[19] Therefore an allegation which did not distinguish clearly whether it was promise or fact, was adjudged ill.[20] Still,—

2. **The Particulars of a Contract**,—which led to the obtaining of the thing, such contract, it is perceived, not being a pretence, need not be given.[21] And—

§ 167. **In Connection with the Other Allegations**,—not as apart from them, must be considered that of the false pretense; so that on the latter alone the crime need not fully appear.[22]

§ 168. Secondly. *Negativing the Pretences*:—

Essential—is a distinct averment that the pretences were false.[23] And not under all circumstances will general words of negation be adequate; but where a proper informing of the prisoner of what he is to respond to requires,[24] the particulars of the falsity must be stated.[25] Under the

169 N. Y. 339, 62 N. E. 418; Taylor v. Ter., 2 Okla. Cr. Ap. 1, 99 P. 628; S. v. Phelps, 41 Wash. 470, 84 P. 24.

19. Vol. I, § 325 (2, 5); Vol. II, § 508. Pretences must be such as will deceive a person of ordinary intelligence. S. v. Phelps, 41 Wash. 470, 84 P. 24.

20. Reg. v. Henshaw, Leigh & C. 444, 449. And see Reg. v. Walne, 11 Cox C. C. 647; S. v. Webb, 26 Iowa, 262. Silence as to material facts is not false pretenses. Stumpff v. P., 51 Colo. 202, 117 P. 134.

21. C. v. Blanchette, 157 Mass. 486, 489, 32 N. E. 658; P. v. Weil, 244 Ill. 176, 91 N. E. 112.

22. C. v. Coe, 115 Mass. 481; Oliver v. S., 37 Ala. 134; Lesser v. P., 73 N. Y. 78; Cowles v. S., 50 Ala. 454. See, as illustrative, and query C. v. Wolcott, 10 Cush. 61; Parker v. S., 98 Ark. 575, 137 S. W. 253.

23. Rex v. Perrott, 2 M. & S. 379; P. v. Haynes, 11 Wend. 557; Amos v. S., 10 Humph. 117; Warrington v. S., 1 Tex. Ap. 168; S. v. Webb, 26 Iowa, 262; S. v. Levi, 41 Tex. 563; S. v. Pickett, 78 N. C. 458; S. v. Smith, 8 Blackf. 489; S. v. Trisler, 49 Ohio St. 583, 31 N. E. 881; S. v. Palmer, 50 Kan. 318, 32 P. 29; Com. v. Caldwell (Ky. 1909), 121 S. W. 480; U. S. v. Post, 113 F. 852; Campbell v. S., 154 Ind. 309, 56 N. E. 665; P. v. Griffith, 122 Cal. 212, 54 P. 725; S. v. Tripp, 113 Iowa, 698, 84 N. W. 546; Com. v. Viser, 24 Ky. L. 1161, 70 S. W. 832; Com. v. Sessions, 169 Mass. 329, 47 N. E. 1034; Cunningham v. S., 61 N. J. L. 666, 40 A. 696.

24. Ante, § 165.

25. S. v. Lambeth, 80 N. C. 393, 395; Keller v. S., 51 Ind. 111; S. v. Trisler, supra. And the proofs will be limited by the particulars. Barber v. P., 17 Hun, 366; S. v.

leading statutes, which, like the repealed one of 30 Geo. 2, c. 24, § 1, have the words "knowingly and designedly by false pretence or pretences,"[26] it is common to cover formally the statutory terms by saying that the defendant "falsely" pretended;[27] but the word "falsely," in this connection, does not render unnecessary the distinct and positive averment that the pretences were false.[28] Nor, where the latter averment appears, is the adverbial "falsely" essential.[29]

§ 169. **Where more Pretences than One**—are set out, it suffices to negative not necessarily all, but so many of them as adequately show an offense,—the rest being rejected as surplusage.[30]

§ 170. Thirdly. *Alleging only a Part of the Pretences*:–

1. **It is not Ill**—to set out only a part of the pretences employed, if still an offense appears.[31] So,—

2. **To lay a Part inadequately**—does not destroy the indictment, if, rejecting the part as surplusage, an offense is duly disclosed.[32]

§ 171. Fourthly. *The Proofs not covering All*:—

It is Sufficient—to prove enough of the false pretences laid to show an offense, though the rest are not proved.[33]

Wilson (Kan. 1905), 80 P. 639; S. v. Murphy, 68 N. J. L. 235, 52 A. 279; S. v. Ryan, 34 Wash. 597, 76 P. 90; Waterman v. S., 114 Ga. 262, 40 S. E. 262.

26. New Crim. Law, II, §§ 411-414.

27. 3 Chit. Crim. Law, 1005-1021; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 289; S. v. Call, 48 N. H. 126.

28. Rex v. Perrott, 2 M. & S. 379.

29. Rex v. Airey, 2 East, 30, 2 East P. C. 831. And see Rex v. Fuller, 1 B. & P. 180; Rex v. Howarth, 3 Stark. Rex v. Henderson, 2 Moody, 192; Reg. v. Bowen, 13 Q. B. 790.

30. C. v. Morrill, 8 Cush. 571; S. v. Smith, 8 Blackf. 489; Skiff v. P., 2 Par. Cr. 139. See Britt v. S., 9 Humph. 31; Barton v. P., 135 Ill. 405, 25 Am. St. 375, 25 N. E. 776; Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77; Cunningham v. S., 61 N. J. L. 666, 40 A. 696.

31. Cowen v. P., 14 Ill. 348.

32. C. v. Parmenter, 121 Mass. 354.

33. Rex v. Hill, Russ. & Ry. 190; Britt v. S., 9 Humph. 31; P. v. Haynes, 14 Wend. 546, 548, 28 Am. D. 530; S. v. Dunlap, 24 Me. 77; S. v. Mills, 17 Me. 211; P. v. Wakely, 62 Mich. 297, 28 N. W. 871; New Crim. Law, II, § 418;

§ 172. Fifthly. *Defendant's Knowledge of the Falsity*:—

1. **The Repealed Statutes**—of 30 Geo. 2, c. 24, § 1, and 52 Geo. 3, c. 64, § 1, had the words "knowingly and designedly;"[34] under which statutes the indictment must, of course, charge the defendant's knowledge of the falsity of the pretense. But—

2. **Omitted**—are these words from 7 & 8 Geo. 4, c. 29, § 53, and 24 & 25 Vict. c. 96, § 88;[35] yet under them such knowledge is still held by construction to constitute a part of the offense, and the averment thereof to be essential. The American doctrine is the same.[36]

§ 173. Sixthly *Specifying Thing obtained, and from whom*:—

1. **Not Everything**—obtained by false pretences. but only what is within the statutory terms, is indictable.[37] Hence, and that the defendant may know to what he is to answer,[38] the thing obtained must be specified, and in a way enabling the court to see that it is within the statute.[39] There is authority for requiring the description to be as

P. v. Smith, 3 Cal. Ap. 62, 84 P. 449; S. v. Keyes, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369; S. v. Dexter, 115 Iowa, 678, 87 N. W. 417; Woods v. S., 133 Ala. 162, 31 So. 984; S. v. Hollingsworth, 132 Iowa, 471, 109 N. W. 1003. In California pretenses must be proved by two witnesses or one witness and corroboration. P. v. Howard, 135 Cal. 266, 67 P. 148.

34. New Crim. Law, II, § 411.

35. Ib., §§ 412, 413.

36. Ib., § 471 (3); Reg. v. Philpotts, 1 Car. & K. 112; S. v. Wilson, 2 Mill, 135; Reg. v. Keighley, Dears. & B. 145, 7 Cox C. C. 217, 20 Eng. L. & Eq. 546; Reg. v. Henderson, 2 Moody, 192, 200 Car. & M. 328; S. v. Blauvelt, 9 Vroom, 306; Maranda v. S., 44 Tex. 442; Hirsch v. S., 1 Tex. Ap. 393; S. v. Hurst, 11 W. Va. 54. See Rex v. Howarth, 3 Stark. 26; C. v. Hulbert, 12 Met. 446; S. v. Smith, 8 Blackf. 489; Arnold v. S., 11 Tex. Ap. 472; Eppstein v. S., 11 Tex. Ap. 480; Vol. II, §§ 523, 623 et seq.

37. New Crim. Law, II, §§ 476-484.

38. Ante, §§ 165, 168.

39. Schleisinger v. S., 11 Ohio St. 669; Hamilton v. Reg., 9 Q. B. 271, 2 Cox C. C. 11; Houston v. S., 153 A. 261, 45 So. 228; Wheeler v. P., 49 Colo. 402, 113 P. 312; Sullivan v. S., 44 Fla. 155, 32 So. 106; Johnson v. S. (Tex. Cr. Ap. 1909), 123 S. W. 143; Bates v. S., 124 Wis. 612, 103 N. W. 251; S. v. Hurst, 11 W. Va. 54; Oglesby v. S., 132 Ga. 506, 51 S. E. 505.

minute as in an indictment for larceny;[40] and "twenty-five dollars in money,"[41] "board,"[42] and "goods and money"[43] have been severally adjudged too general. The indictment need not mention all the property in fact obtained, any more than all the pretences employed.[44] And—

2. **The Ownership**—must be averred,[45] or a valid reason "given for the omission."[46] Money sent by a husband to his wife for her support must be laid as his.[47] A bailor is, for the purposes of this averment, an owner,[48] the same as in larceny.[49]

3. **The Name of the Person**—defrauded,[50] and that of

40. P. v. Conger, 1 Wheeler Crim. Cas. 448, 450; Smith v. S., 33 Ind. 159; Treadaway v. S., 37 Ark. 443; Jamison v. S., 37 Ark. 445, 40 Am. R. 103; S. v. Reese, 83 N. C. 637. And see New Crim. Law, II, §§ 477-479; Deftwich v. C., 20 Grat. 716; Maxey v. S., 85 Ark. 499, 108 S. W. 1135; S. v. Jackson, 128 Iowa, 543, 105 N. W. 51; Appleby v. S., 63 N. J. L. 526, 42 A. 847; S. v. Morgan, 109 Tenn. 157, 69 S. W. 976; S. v. Phelps, 41 Wash. 470, 84 P. 24; Bates v. S., 124 Wis. 612, 103 N. W. 201.

41. Smith v. S., supra. See Reg. v. Godfrey, Dears. & B. 426, 7 Cox C. C. 392. Contra, Oliver v. S., 37 Ala. 134. The expression "divers United States treasury notes and national bank notes and fractional currency notes, amounting, in the whole, to one hundred and fifty-eight dollars, and of the value of one hundred and fifty-eight dollars," was adjudged adequate. S. v. Hurst, 11 W. Va. 54. And see S. v. Kube, 20 Wis. 217, 91 Am. D. 390; Edwards v. S., 49 Ala. 334.

42. Reg. v. McQuarrie, 22 U. C. Q. B. 600.

43. S. v. Reese, supra.

44. P. v. Parish, 4 Denio, 153.

45. Sill v. Reg., 1 Ellis & B. 553, Dears. 132, 16 Eng. L. & Eq. 375; Reg. v. Kenrick, Dav. & M. 208, 5 Q. B. 49; S. v. Smith, 8 Blackf. 489; Reg. v. Martin, 3 Nev. & P. 472, 8 A. & E. 481; Reg. v. Walker, 10 U. C. Q. B. 465; Halley v. S., 43 Ind. 509; Reg. v. Norton, 8 Car. & P. 196; Washington v. S., 41 Tex. 583; Leobold v. S., 33 Ind. 484; Reg. v. Godfrey, supra; Mays v. S., 28 Tex. Ap. 484; S. v. Blizzard, 70 Md. 385, 14 Am. St. 366, 17 A. 270. See Mack v. S., 63 Ala. 138; S. v. Miller, 153 Ind. 229, 54 N. E. 808; Strickland v. S., 51 Fla. 129, 40 So. 178; S. v. Jackson, 128 Iowa, 543, 105 N. W. 51.

46. S. v. Lathrop, 15 Vt. 279. See post, § 718.

47. C. v. Davis, 9 Cush. 283.

48. Britt v. S., 9 Humph. 31.

49. Post, § 721.

50. S. v. Horn, 93 Mo. 190 (overruling S. v. Myers, 82 Mo. 558); Reg. v. Sowerby, 1894, 2 Q. B. 173; S. v. McChesney, 90 Mo. 120, 1 S. W. 841; P. v. Cline, 44 Mich. 290; Bates v. S., 124 Wis. 612, 103 N. W. 251. Name of Corporation. P. v. Russell, 156 Cal. 450, 105 P. 416; see also, S. v. Horn, 93 Mo. 190, 6 S. W. 96.

the one to whom the pretence was addressed,[51] should be averred. And—

§ 174. **Different Persons.**—Since the pretences may be addressed to one to defraud another, and the ownership may be in yet another, while the legal effect of the transaction may differ from its outward form, the allegation may cover the facts as viewed either legally or outwardly.[52]

§ 175. Seventhly. *Connecting the Pretences and the Accomplished Fraud:*—

To constitute the Completed Offence,—the thing must be obtained, the allegation whereof must be in words fully covering the idea; so that in some cases the single word "obtained" suffices, and in others a delivery must be charged.[53] Such obtaining must not come independently of the false pretences, but by their means;[54] so must be the allegation,[55] and sufficiently in detail to

51. Reg. v. Sowerby, supra, in which the indictment in Reg. v. Hunter, 10 Cox C. C. 642, was deemed ill; Bailey v. S., 158 Ala. 18, 48 So. 791.

52. Compare Vol. I, §§ 332-334; New Crim. Law, II, § 472; C. v. Call, 21 Pick. 515; P. v. Krummer, 4 Par. Cr. 217; Reg. v. Dent. 1 Car. & K. 249; C. v. Davis, 9 Cush. 283; S. v. Crowley, 10 Vroom, 264; Reg. v. Moseley, Leigh & C. 92, 9 Cox C. C. 16. See Thompson v. P., 24 Ill. 60, 76 Am. D. 733.

53. Haines v. Territory, 3 Wyo. 167, 13 P. 8; S. v. McGinnis, 71 Iowa, 685, 33 N. W. 338; S. v. Clark, 72 Iowa, 30, 33 N. W. 340; S. v. Lewis, 26 Kan. 123; S. v. Blizzard, 70 Md. 385, 14 Am. St. 366, 17 A. 270; S. v. Switzer, 63 Vt. 604, 25 Am. St. 789, 22 A. 724; Roberts v. S. (Ark.), 108 S. W. 842; West v. S., 63 Neb. 257, 88 N. W. 503. "Induced" is equivalent to "obtained." S. v. Brown, 143 Wis. 405, 127 N. W. 956.

54. New Crim. Law, II, §§ 460-462.

55. Enders v. P., 20 Mich. 233; S. v. Saunders, 63 Mo. 482; Cowles v. S., 50 Ala. 454; Clifford v. S., 56 Ind. 245; S. v. Penley, 27 Conn. 587; White v. S., 3 Tex. Ap. 605; Jones v. S., 50 Ind. 473, 478, 479; C. v. Dunleay, 153 Mass. 330, 26 N. E. 870; Reg. v. Sliverlock, 1894, 2 Q. B. 766; Cowan v. S., 22 Neb. 519, 24 N. W. 247; S. v. Neimeir, 66 Iowa, 634; Sutton v. S., 14 Tex. Ap. 518; Ervin v. S., 11 Tex. Ap. 536; Pendry v. S., 18 Fla. 191; S. v. Metsch, 37 Kan. 222, 15 P. 251; S. v. Jordan, 34 La. Ann. 1219. And see Reg. v. Martin (Law Rep.), 1 C. C. 56; P. v. Emmons, 13 Cal. Ap. 487, 110 P. 151; S. v. Johnston, 154 Mo. Ap. 265, 134 S. W. 38; S. v. Whedbee, 152 N. C. 770, 67 S. E. 60; S. v. Merry, 20 N. D. 337, 127

put the defendant in a position duly to make his defence.[56]

§ 176. **The Words of most of the Statutes**—are to this effect. Beyond which, and independently of the words, this result comes from the general principles of the law of the offense.[57] Such law may even require the averment to be expanded beyond the statutory terms.[58] For example, though in terms the statutes ordinarily require only that the thing shall be "obtained by" the false pretence, allegations that the defrauded person relied on it, and other like particulars disclosing the transaction, may be necessary.[59]

§177. Eighthly. *Alleging the Value:*—

The General Rules—as to alleging value [60] apply to these false-pretence cases.[61] Where the punishment which the law affixes, in distinction from the discretion of judge or jury,[62] depends in any degree on the value of the thing obtained, it must be set out.[63] It is not ordinarily necessary in other circumstances.[64]

§ 178. Ninthly. *Alleging Tenor or Substance:*—

1. **Not Generally**—need a false pretence be set out by its tenor, the substance sufficing.[66] Also—

N. W. 83; Robinson v. S., 60 Tex. Cr. Ap. 353, 132 S. W. 354; Simmons v P., 187 Ill. 327, 58 N. E. 384; Melk v. S., 117 Ala. 116, 23 So. 155; S. v. Miller, 153 Ind. 229, 54 N. E. 808.

56. C. v. Strain, 10 Met. 521; S. v. Bonnell, 46 Mo. 395; C. v. Goddard, 4 Allen, 312; Epperson v. S., 42 Tex. 79; Norris v. S., 25 Ohio St. 217, 18 Am. R. 291; P. v. General Sessions, 13 Hun, 395. See S. v. Cameron, 117 Mo. 371, 22 S. W. 1024.

57. And see In re Cameron, 44 Kan. 64, 21 Am. St. 262, 24 P. 90.

58. C. v. Strain, 10 Met. 521; and other cases cited to the last section.

59. Ib.; Johnson v. S., 11 Ind. 481, 482; S. v. Orvis, 13 Ind. 569; S. v. Green, 7 Wis. 676; S. v. Philbrick, 31 Me. 401; Clark v. P., 2 Lans. 329 (disapproving the doctrine of the case last cited).

60. Vol. II, §§ 540, 567.

61. Mathews v. S., 10 Tex. Ap. 279.

62. Vol. I, §§ 77-88.

63. S. v. Ladd, 32 N. H. 110.

64. P. v. Stetson, 4 Barb. 151, 153; S. v. Dorr, 33 Me. 498; S. v. Gillespie, 80 N. C. 396; Oliver v. S., 37 Ala. 134; Bates v. S., 124 Wis. 612, 103 N. W. 251.

65. Vol. II, §§ 559-563.

66. S. v. Tatum, 96 Miss. 430, 50 So. 490; S. v. Call, 48 N. H. 126; S. v. Vanderbilt, 3 Dutcher, 338; S. v. Blizzard, 70 Md. 385, 14 Am. St. 366, 17 A. 270; P. v. Weil, 244 Ill. 176, 91 N. E. 112. The device, trick

2. **The Doctrine of Colloquium,**—and the like, familiar in proceedings for libel, forgery, and some others, has no place in these false-pretence cases.[67] Still,—

3. **The Tenor**—not improbably may be required in some cases wherein the essence of the offense consists of the exact words. And—

4. **For obtaining the Signature**—to a written instrument, the tenor of it was in Alabama held to be necessary.[68] But an indictment for thus getting "a check for the payment of money," not setting it out at length, was in Massachusetts adjudged good.[69]

§ 179. Tenthly. *Following the Statutory Words*:—

Incorporated into the Indictment—must be the words and phrases of the statute, to the extent and permitting the variations pointed out in the first volume.[70] Thus,—

§ 180. 1. **The Term "False Pretences,"**—in the statute, is not supplied in the indictment by "*feloniously* pretend."[71] But—

2. **"Pretend"—"Represent."**—"Pretend" in the indictment, for "represent" in the statute, is not ill.[72] And—

3. **Beyond the Statutory Words**—the allegations may even require to be expanded,[73] as elsewhere shown.[74]

or fraudulent representation must be set forth with such particularity as will enable accused to know what charge he has to meet. S. v. McChesney, 90 Mo. 120; S. v. Martin, 226 Mo. 538, 539, 126 S. W. 442.

67. Ib.; S. v. Call, supra.

68. Langford v. S., 45 Ala. 26. See Oliver v. S., 37 Ala. 134.

69. C. v. Coe, 115 Mass. 481. A statute excluding evidence of oral false representations unless accompanied by false pretenses in writing, does not require the writing to contain the whole pretense, though it should accompany and corroborate the oral statement. S. v. Germain, 54 Oreg. 395, 103 P. 521. See post, § 183.

70. Vol. II, §§ 608-622; ante, § 176; Respublica v. Tryer, 3 Yeates, 451; S. v. Williams, 8 Tex. 255; Ellars v. S., 25 Ohio St. 385; Reg. v. James, 12 Cox C. C. 127, 2 Eng. Rep. 192; C. v. Hooper, 104 Mass. 549.

71. Rex v. Walker, 6 Car. & P. 657.

72. Jones v. S., 50 Ind. 473.

73. C. v. Strain, 10 Met. 521, 523; C. v. Lannan, 1 Allen, 590; C. v. Goddard, 4 Allen, 312.

74. Vol. II, §§ 623-630; ante, §§ 175, 176.

§ 181. **"Feloniously."**—Where the statutory words are "feloniously" obtain, etc., and generally if the offense in the particular State is felony,[76] the indictment must say "feloniously."

§ 182. 1. **Intent.**—Where the statute, like the English ones,[77] has the words "with intent to defraud," they must be also in the indictment.[78] Otherwise they may be omitted.[79] In proof,—

2. **The Intent to Defraud**—may be inferred from the false representation.[80] It is a question for the jury.[81]

§ 183. Eleventhly. *Avoiding a Variance*:—

1. **Essential.**—The indictment should be in terms to avoid any variance at the trial between allegation and proof.[82] Conformity to this rule is attained only by the exercise of a practical skill, in conjunction with legal knowledge. Thus,—

2. **Substance or Tenor.**—Where the substance of a writ-

75. S. v. Tate, 6 Humph. 424; S. v. Johnson, 6 Humph. 426, note.

76. S. v. Caldwell, 112 N. C. 854, 16 S. E. 1010; S. v. Bryan, 112 N. C. 848, 16 S. E. 909.

77. New Crim. Law, II, §§ 411-413.

78. Reg. v. James, 12 Cox C. C. 127, 2 Eng. Rep. 192; S. v. Scott, 48 Mo. 422; S. v. Switzer, 63 Vt. 604, 25 Am. St. 789, 22 A. 724; Stringer v. S., 13 Tex. Ap. 520; S. v. Bradley, 68 Mo. 140; S. v. Smallwood, 68 Mo. 192. And see O'Connor v. S., 30 Ala. 9; Miller v. S., 73 Ind. 88; White v. S., 86 Ala. 69, 5 So. 674; S. v. Phelps, 41 Wash. 470, 84 P. 24; P. v. Cohen, 147 Ill. Ap. 393.

79. S. v. Bacon, 7 Vt. 219, 222; Jim v. S., 8 Humph. 603. And see S. v. Morgan, 112 Mo. 202, 20 S. W. 456; S. v. Hazen, 104 Iowa, 16, 73 N. W. 359; Isaacs v. S., 7 Ga. Ap. 799, 68 S. E. 338. And see S. v. Martin, 226 Mo. 538, 126 S. W. 442.

80. P. v. Herrick, 13 Wend. 87. And see Tompkins v. S., 33 Tex. 228; Robinson v. S., 33 Tex. 341; Reg. v. Gray, 17 Cox C. C. 299; post, § 190. Intent must exist at time of obtaining goods. Price v. S., 49 Tex. Cr. 131, 91 S. W. 571.

81. S. v. Scott, supra; Rex v. Williams, 7 Car. & P. 354; Reg. v. Cooper, 2 Q. B. D. 510.

82. Vol. II, §§ 483, 484a-488e; Reg. v. Butcher, Bell, C. C. 6, 8 Cox, C. C. 77; Reg. v. Ward, 1 Cox, C. C. 101; U. S. v. Bowen, 3 MacAr. 64; Marwilsky v. S.. 9 Tex. Ap. 377; Sitman v. S., 9 Tex. Ap. 461; Prehm v. S., 22 Neb. 673, 36 N. W. 295; Willis v. P., 19 Hun, 84; Reg. v. Willot, 12 Cox C. C. 68; Lory v. P., 229 Ill. 268, 82 N. E. 261.

ing will suffice,[83] it is not prudent to set it out by its tenor, which requires extreme nicety of allegation and proof.[84]

3. **A "Flash Note"**—being the false pretence, an allegation was sustained describing it as "a certain printed paper, produced by" the defendant, pretending it "was a good and valid promissory note for the payment of five pounds."[85] But caution even in this sort of averment is prudent. For where the false pretence to be proved was that the note of a broken bank was good, and the pretence alleged was that "a certain piece of paper," set out in full, "was a good negotiable promissory note and bank bill, and security for the payment of five dollars," which in fact it was not, this was deemed to describe a counterfeit, or the note of a non-existing bank, not a genuine undertaking of a bankrupt promisor, and the variance was held fatal.[86] Again,—

4. **A Joint or Several Instrument or Fraud**—must be described according to the fact, or the variance will be fatal.[87]

§ 184. 1. **Only the Substance of the Issue**—need in many cases be proved, unless the allegation is in form descriptive. This applies specially to number, value, and the like; but it has been already considered.[88]

83. Ante, § 178 (1).

84. Vol. II, § 562.

85. Reg. v. Coulson, 1 Den. C. C. 592, Temp. & M. 332, 4 Cox, C. C. 227, 1 Eng. L. & Eq. 550.

86. Reg. v. Coulson, 1 Den. C. pare with Reg. v. Wickham, 10 A. & E. 34; Wickham v. Reg., 2 Per. & D. 333; Reg. v. Smith, 6 Cox C. C. 314; Reg. v. Hazleton (Lew. Rep.), 2 C. C. 134; Moore v. S., 20 Tex. Ap. 233. And see Baker v. S., 31 Ohio St. 314; S. v. Locke, 35 Ind. 419; S. v. Blauvelt, 9 Vroom, 306; Reg. v. Carpenter, 11 Cox, C. C. 600.

87. C. v. Pierce, 130 Mass. 31; Kirtley v. S., 38 Ark. 543; P. v. Reed, 70 Cal. 529, 11 P. 676. And see Wallace v. S., 11 Lea, 542.

88. Vol. II, § 488b, and various connected places. O'Connor v. S., 30 Ala. 9; Reg. v. Leonard, 1 Den. C. C. 304; C. v. Coe, 115 Mass. 481; Todd v. S., 31 Ind. 514; S. v. Smith, 75 N. C. 141; C. v. Davidson, 1 Cush. 33; C. v. Ashton, 125 Mass. 384.

Sale on credit. An allegation of "a sale obtained upon credit" is proved though a promissory note was given. C. v. Davidson, 1 Cush. 33, 40.

Money obtained through a check—may be treated as money. S. v. Palmer, 40 Kan. 474, 20 P. 270.

2. **Ownership**—must be proved as laid.[89]

3. **Surplusage**—may sometimes be rejected to avoid a variance.[90]

§ 185. Twelfthly. *Charging the Act as Larceny*:—

1. **Under the Statutory Words**,—" if a person obtain by any false pretence or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of the larceny thereof," it was held that there may be a conviction on an indictment in common form as for larceny.[91] Or, if the pleader chooses, he may set out the special facts instead.[92] But—

2. **This Form of the Statute**—is not common in our States. And, wherever found, the former of the two above methods of allegation would be contrary to principles generally maintained.[93]

§ 186. Thirteenthly. *The Entire Structure of Indictment*:—

While heeding the Foregoing particulars,—the pleader should still bear in mind that the indictment is one entire charge, to be made harmonious, distinct, and full, as a whole.

III. *The Evidence.*

§ 187. 1. **Something of the Evidence**—appears in the preceding sub-titles. So much of the allegation as con-

89. Rex v. Douglass, 1 Camp. 212.

90. Vol. II, §§ 485-487; Reg. v. Kealey, 2 Den. C. C. 68, 5 Cox C. C. 193, 1 Eng. L. & Eq. 585; Reg. v. Boynes, 1 Car. & K. 65.

91. Anable v. C., 24 Grat. 563; Dowdy v. C., 9 Grat. 727, 734, 60 Am. D. 314. And see Fay v. C., 28 Grat. 912. For Arkansas. S. v. Lester, 94 Ark. 242, 126 S. W. 846; California. P. v. Emmons, 13 Cal. Ap. 487, 110 P. 151.

92. Leftwich v. C., 20 Grat. 716.

93. Stat. Crimes, §§ 412-429. Compare Reg. v. Norton, 8 Car. & P. 196, with Archbold's form, always accepted as good, Archb. Crim Pl. & Ev. (10th Lond. Ed.) 289; and Hamilton v. Reg., 9 Q. B. 271.

stitutes an offence must be proved, not necessarily more.[94] Nor can any defect herein be supplied by proof of what is not alleged.[95] Presumptions are resorted to in these cases, the same as in others.[96] And—

2. **Variance**—must be avoided:[97] as, on the averment that the defendant said he had paid a sum into the bank, but the proof was that he said the money had been paid, not stating by whom, "the defendant was acquitted for the variance; Lord Ellenborough holding that the assertions were different in substance."[98] But an allegation of false

94. Ante, §§ 169-171; S. v. Burge, 7 Iowa, 255; Cowles v. S., 50 Ala. 454; Fay v. C., 28 Grat. 912; S. v. Pitts, 13 Rich. 27; C. v. Hutchison, 114 Mass. 325; Reg. v. Foster, 2 Q. B. D. 301; Bowler v. S., 41 Miss. 570; Reg. v. Walne, 11 Cox C. C. 647; C. v. Howe, 132 Mass. 250; Barton v. P., 135 Ill. 405, 25 Am. St. 375, 25 N. E. 776; P. v. Wakely, 62 Mich. 297, 28 N. W. 871; Carlisle v. S., 76 Ala. 75; S. v. Penny, 70 Iowa, 190, 30 N. W. 561; Reg. v. Stenson, 12 Cox C. C. 111; S. v. Norton, 76 Mo. 180; Jackson v. P., 126 Ill. 139, 18 N. E. 286; Young v. S., 155 Ala. 145, 46 So. 580; P. v. Jordan, 66 Cal. 10, 12, 4 Pac. 773, 56 Am. 73; P. v. Leavens, 12 Cal. Ap. 178, 106 P. 1103; Morris v. S., 54 Fla. 80, 45 So. 456; Ryan v. S., 104 Ga. 78, 30 S. E. 678; S. v. Clark, 46 Kan. 65, 66, 26 Pac. 481; S. v. Bingham, 51 Wash. 616, 99 Pac. 735; Clawson v. S., 129 Wis. 650, 109 N. W. 578, 116 Am. St. 972.

95. Reg. v. Bulmer, Leigh & C. 476, 9 Cox C. C. 492; P. v. Gates, 13 Wend. 311; Barber v. P., 17 Hun, 366.

96. Ante, § 182 (2); post, §§ 189, 190; Reg. v. Langton, 2 Q. B. D. 296; S. v. Call, 48 N. H. 126; Reg. v. Wenham, 10 Cox C. C. 222; Bozier v. S., 5 Tex. Ap. 220; Abbott v. P., 75 N. Y. 602; S. v. Rivers, 58 Iowa, 102, 43 Am. R. 112, 12 N. W. 117; S. v. Decker, 36 Kan. 717, 14 P. 283; P. v. Leavens, 12 Cal. Ap. 178, 106 P. 1103.

97. Ante, §§ 161, 183, 184; Edwards v. S., 49 Ala. 334; C. v. Jeffries, 7 Allen, 548, 83 Am. D. 712; S. v. Bloodsworth, 25 Or. 83, 34 P. 1023. See, Stumpf v. P. (Colo. 1911), 117 P. 134; Bates v. S., 124 Wis. 612, 103 N. W. 251. An allegation of two or more false pretenses is sustained by proof of one or more. Woodruff v. S., 61 Ark. 157, 32 S. W. 102; Limouze v. P., 58 Ill. Ap. 314; S. v. Vandimark, 35 Ark. 396, 402; Skiff v. P., 2 Park. Cr. (N. Y.) 139, 146; Todd v. S., 31 Ind. 514, 523; Rex v. Ady, 7 C. & P. 140; Com. v. Morrill, 8 Cush. (Mass.) 571, 574; S. v. Mills, 17 Me. 211; Webster v. P., 92 N. Y. 422, 427; P. v. Blanchard, 96 N. Y. 314, 319; S. v. Keyes, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369n; Cunningham v. S., 61 N. J. L. 666, 40 Atl. 696; Day v. Com. (Ky.), 110 S. W. 417, 33 Ky. L. 560.

98. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 294, 295, referring to Rex v. Plestow, 1 Camp. 494. See Rex v. Douglass, 1 Camp. 212.

pretences to a county, and proof of them to its officers, creates no variance.[99]

3. **A Lost Written Pretence**[1]—may be proved by parol.[2]

§ 188. 1. **The Pretence alleged**—must be shown to have been the inducement to the parting with the goods.[3] And—

2. **The Thing Obtained**—thereby must appear in the evidence to be within the statute and the indictment.[4] Also—

3. **The Defendant's Knowledge of the Falsity**—must be *shown.*[5]

99. Roberts v. P., 9 Colo. 458, 13 P. 630.

1. Reg. v. Cooper, 2 Q. B. D. 510; Reg. v. Cooper, 1 Q. B. D. 19; Reg. v. Adamson, 2 Moody, 286, 1 Car. & K. 192; Lindsay v. Cundy, 1 Q. B. D. 348.

2. Rex v. Chadwick, 6 Car. & P. 181.

3. New Crim. Law, II, § 461; Reg. v. Bulmer, Leigh & C. 476, 9 Cox C. C. 492; Rex v. Douglass, 1 Camp. 212; Rex v. Dale, 7 Car. & P. 352; Woodbury v. S., 69 Ala. 242, 246, 44 Am. 515; Meek v. S., 117 Ala. 116, 23 So. 155; Donohue v. S., 59 Ark. 375, 27 S. W. 226; P. v. Gibbs, 98 Cal. 661, 663, 33 Pac. 630; Swift v. S., 126 Ga. 590, 55 S. E. 478; Goddard v. S., 2 Ga. Ap. 154, 58 S. E. 304; S. v. Williams, 103 Ind. 235, 237, 2 N. E. 585; S. v. Fooks, 65 Iowa, 196, 21 N. W. 561, 773; S. v. Palmer, 50 Kan. 318, 32 Pac. 29; S. v. Tessier, 32 La. Ann. 1227; S. v. Pickett, 174 Mo. 663, 74 S. W. 844; Wax v. S., 43 Neb. 18, 61 N. W. 117; P. v. Sattlekau, 120 Ap. Div. 42, 104 N. Y. S. 805; P. v. Herrick, 13 Wend. (N. Y.) 87, 91; Taylor v. Ter., 2 Okla. Cr. Ap. 1, 99 P. 628; Britt v. S., 9 Humph. (Tenn.) 30; Trogdon v. Com., 31 Gratt (Va.) 862, 884; S. v. Bingham, 51 Wash. 616, 99 Pac. 735; Reg. v. Mills, 7 Cox C. C. 263.

4. Rex v. Yates, 1 Moody, 170; Rex v. Wavell, 1 Moody, 224; Morgan v. S., 42 Ark. 131, 140, 48 Am. 55; S. v. Gibson, 132 Iowa, 53, 106 N. W. 270; S. v. Lewis, 26 Kan. 123, 129; S. v. Shaeffer, 89 Mo. 271, 278, 1 S. W. 293; Rosales v. S., 22 Tex. Ap. 673, 675, 3 S. W. 344; S. v. Davis, 150 N. C. 851, 64 S. E. 498. An allegation of obtaining money is sustained by proof of a check which was at once turned into money; S. v. Germain, 54 Ore. 395, 103 P. 521; but not by proof that a satisfaction of a debt was obtained by false representation of the property given in satisfaction. S. v. Daniel, 83 S. C. 309, 65 S. E. 236.

5. Reg. v. Walne, 11 Cox, C. C. 647; Reg. v. Burrows, 11 Cox, C. C. 258; Rex v. Dobson, 7 East, 218; Reg. v. Foster, 2 Q. B. D. 301; P. v. Hamberg, 84 Cal. 468, 24 P. 298. See Buckalew v. S., 11 Tex. Ap. 352; S. v. Lichliter, 95 Mo. 402, 8 S. W. 720; Carlisle v. S., 2 Ga. Ap. 651, 58 S. E. 1068.

§ 189. **In Aid of the Proofs**—of guilty knowledge and evil intent,[6] evidence may be given of other successful and unsuccessful attempts of the like sort.[7] This evidence is, by many, limited ordinarily to what took place before or simultaneously with the act charged.[8] But where the two transactions are connected, and perhaps in other special circumstances, they permit it to extend to subsequent doings; while, it appears, others allow this as the general rule.[9] The latter is believed to be the better doctrine in principle.[10] Yet regard should be had to what is special to the individual case.

§ 190. **The Evil Intent,**—always necessary to be shown,[11]

6. Vol. II, § 1126.

7. S. v. Long, 103 Ind. 481, 3 N. E. 169; S. v. Walton, 114 N. C. 783, 18 S. 945; S. v. Jamison, 74 Iowa, 613, 38 N. W. 509; S. v. Beaucleigh, 92 Mo. 490, 4 S. W. 666; Mayor v. P., 80 N. Y. 364.

8. Reg. v. Francis (Law Rep.), 2 C. C. 128, 12 Cox, C. C. 612, 9 Eng. Rep. 509; Reg. v. Hamilton, 1 Cox, C. C. 244; Reg. v. Holt, Bell, C. C. 280, 8 Cox C. C. 411; S. v. Church, 43 Conn. 471; Rex v. Smith, 4 Par. & P. 411; S. v. Myers, 82 Mo. 558, 52 Am. R. 389; Trogdon v. C., 31 Grat. 862; S. v. Bayne, 88 Mo. 604; C. v. Jackson, 132 Mass. 16, 44 Am. R. 299, note. But see Todd v. S., 31 Ind. 514. And see Bottomley v. U. S., 1 Story, 135; Strong v. S., 86 Ind. 208, 213, 44 Am. 292n; S. v. Long, 103 Ind. 481, 485, 3 N. E. 169; Com. v. Jeffries, 7 Allen (Mass.), 548, 83 Am. Dec. 712n; P. v. Henssler, 48 Mich. 49, 11 N. W. 804; S. v. Jackson, 112 Mo. 585, 589, 20 S. W. 674; Mayer v. P., 80 N. Y. 364, 372; Bielschofsky v. P., 3 Hun (N. Y.), 40; S. v. Walton, 114 N. Car. 783, 18 S. E. 945; Hutcherson v. S. (Tex. 1896), 35 S. W. 375; Martin v. S., 36 Tex. Cr. 125, 35 S. W. 976.

9. Reg. v. Forster, Dears. 456, 6 Cox, C. C. 521, 29 Eng. L. & Eq. 548; Rex v. Taverner, Car. Crim. Law (3d Ed.), 195, 4 Car. & P. 413, note; Reg. v. Roebuck, Dears. & B. 24, 26, 7 Cox, C. C. 126, 36 Eng. L. & Eq. 631; Britt v. S., 9 Humph. 31; Reg. v. Kain, 8 Car. & P. 187; Lynde v. McGregor, 13 Allen, 172. See Vol. II, § 1128; Strong v. S., 86 Ind. 208, 217, 44 Am. 292n; S. v. Seligman, 127 Iowa, 415, 103 N. W. 357; S. v. Gibson, 132 Iowa, 53, 106 N. W. 270; Carnell v. S., 85 Md. 1, 36 Atl. 117; Com. v. Howe, 132 Mass. 250, 260; Com. v. Blood, 141 Mass. 571, 576, 6 N. E. 769; Com. v. Burton, 183 Mass. 461, 67 N. E. 419; P. v. Henssler, 48 Mich. 49, 53, 11 N. W. 804; S. v. Sparks, 79 Neb. 504, 113 N. W. 154, rehearing denied, 79 Neb. 511, 114 N. W. 598; S. v. Newman, 73 N. J. L. 202, 62 Atl. 1008; Rafferty v. S., 91 Tenn. 655, 666, 16 S. W. 728; S. v. Poole, 42 Wash. 192, 84 Pac. 727.

10. See Stat. Crimes, §§ 681-684.

11. S. v. Austin, 79 N. C. 624; Reg. v. Foster, 2 Q. B. D. 301; S.

may be inferred from the evil act proved as constituting the offense.[12] But other proofs are not therefore incompetent;[13] as, that the defendant, while making the false pretences, was deeply insolvent.[14]

§ 191. **The Falsity of the Pretences,**—not simply the defendant's knowledge of it,[15] must be affirmatively proved.[16] But *prima facie* evidence is sufficient till rebutted;[17] as, that a bank, a bill of which the defendant had passed representing it to be good, had stopped payment, proof of the bankruptcy proceedings not being required.[18] If the representation was that the defendant possessed ample

v. Briscoe, 6 Pen. (Del.) 401, 67 Atl. 154, 25 Am. St. 387; Ager v. S., 2 Ga. Ap. 158, 58 S. E. 374; Todd v. S., 31 Ind. 514, 516; S. v. Fields, 118 Ind. 491, 492, 21 N. E. 252; Com. v. Devlin. 141 Mass. 423, 430, 6 N. E. 64; Bowler v. S., 41 Miss. 570, 578; Sharp v. S., 53 N. J. L. 511, 513, 21 Atl. 1026; P. v. Baker, 96 N. Y. 340, 349; Coblentz v. S., 84 Ohio, 235, 95 N. E. 768.

12. Ante, § 182 (2); Rex v. Williams, 7 Car. & P. 354; S. v. Briscoe, 6 Penn. (Del.) 401, 67 Atl. 154; S. v. Hartnett, 7 Penn. (Del.) 204, 74 A. 82; P. v. Baker, 96 N. Y. 340, 2 N. Y. Cr. 218; S. v. Walton, 114 N. Car. 783, 787, 18 S. E. 945.

13. See the cases cited to the last section.

14. C. v. Jeffries, 7 Allen, 548, 83 Am. D. 712. The intent is for the jury and the evidence is allowed a wide range. S. v. Norton, 76 Mo. 180, 182; Brown v. P., 16 Hun (N. Y.), 535, 537; P. v. Thomas, 3 Hill (N. Y.), 169; Parmelee v. P., 8 Hun (N. Y.), 623; Dorsey v. S., 111 Ala. 40, 20 So. 629; P. v. Gibbs, 98 Cal. 661, 665, 33 Pac. 630; S. v. Rivers, 58 Iowa, 102, 110, 12 N. W. 117, 43 Am. 112; P. v. Shelters, 99 Mich. 333, 334, 58 N. W. 362; S. v. Alexander, 119 Mo. 447, 462, 24 S. W. 1060.

15. Ante, § 188 (3); S. v. Whedbee, 152 N. C. 770, 67 S. E. 60.

16. Rex v. Dobson, 7 East, 218; Reg. v. Foster, 2 Q. B. D. 301, 13 Cox, C. C. 393; Bowler v. S., 15 Hun (N. Y.), 347, 352; S. v. Wilbourne, 87 N. Car. 529, 532. The admissions of defendant are competent to prove the falsity of his representations. S. v. Lewis, 45 Iowa, 20, 22; S. v. Penny, 70 Iowa, 190, 30 N. W. 561; S. v. Long, 103 Ind. 481, 3 N. E. 169; Meek v. S., 117 Ala. 116, 23 So. 155; Lawrence v. S., 103 Md. 17, 63 Atl. 96; P. v. Chrones, 75 Pac. 180, 141 Cal. 18. Falsity may also be inferred from circumstances. P. v. Pinckney, 67 Hun (N. Y.), 428, 430, 22 N. Y. S. 118; Glover v. S. (Tex. 1909), 122 S. W. 396. See, also, S. v. Clark, 141 Iowa, 297, 119 N. W. 719.

17. Reg. v. Wenham, 10 Cox C. C. 222. And see Reg. v. Browning, 3 Cox, C. C. 437.

18. Reg. v. Smith, 6 Cox C. C. 314. And see C. v. Stone, 4 Met. 43; P. v. Chandler, 4 Par. Cr. 231.

means, a mortgage by him, three days afterward, of all his property, is admissible.[19] On the other hand, one who has made pretence of a specific fact, proved to be untrue, cannot defend himself by showing that he was then in good pecuniary credit and standing.[20]

§ 192. **A Witness**—may be the person defrauded.[21] And he may state what influence the defendant's representations had upon him.[22]

§ 193. **Pretences by a Third Person**—are inadmissible, unless it is first shown that he was instigated by the defendant to make them,[23] or the two were conspiring,[24] or that there was in the case some other like exceptional fact. Even where the pretence is that a promissory note of a third person is genuine, the latter's declarations of the defendant's authority to sign it are "mere hearsay."[25]

IV. *The Procedure for the Attempt.*

§ 194. 1. **The Title "Attempt"**—should be consulted in connection with this sub-title.

2. **For the Indictment,**—a ready but not the exclusive method is to draw it in the same form as for the accomplished fraud; except that where the latter has "did then and there unlawfully obtain," etc., say "did then and there attempt unlawfully to obtain," etc.,[26] or "unlawfully attempt and endeavor unlawfully to obtain." etc.[27]

19. S. v. Call, 48 N. H. 126.

20. S. v. Penley, 27 Conn. 587. And see P. v. Genung, 11 Wend. 18, 25 Am. D. 594.

21. Reg. v. Mackartney, 1 Salk. 286; Holt, 300, 301. It appears to have been once thought otherwise. Rex v. Whiting, 1 Salk. 283, 1 Ld. Raym. 396; Com. v. Drew, 153 Mass. 588, 595, 27 N. E. 593.

22. P. v. Miller, 2 Par. Cr. 197; P. v. Herrick, 13 Wend. 87; P. v. Weil, 244 Ill. 176, 91 N. E. 112; S. v. Hetrick, 84 Kan. 157, 113 P. 383. If no reliance on pretenses conviction cannot be sustained. Stumpff v. P., 51 Colo. 202, 117 P. 134.

23. P. v. Parish, 4 Denio, 153; Todd v. S., 31 Ind. 514, 520; S. v. McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. St. 341.

24. Vol. II, § 1248; Young v. Rex, 3 T. R. 98.

25. C. v. Goddard, 2 Allen, 148.

26. Reg. v. Henshaw, Leigh & C. 444.

27. Reg. v. Kealey, 2 Den. C. C. 68, 70, 5 Cox C. C. 193.

§ 195. **How minute.**—Probably this form may be abridged in its description of the goods to be obtained.[28] But "the nature of the attempt must," says Archbold,[29] "be set forth with reasonable certainty;" it not being, for example, sufficient to say merely that the defendant "did unlawfully attempt and endeavor fraudulently, falsely, and unlawfully to obtain," etc.[30]

§ 196. **As to Variance,**—an attempt charged as made by a paper writing purporting to be an order for money, is not proved by one which does not purport to be such order.[31]

V. *Questions of Practice.*

§ 197. 1. **The County**—wherein crimes are to be laid as committed was considered in the first volume,[32] and something was there said of cheats and false pretences in particular.[33] To illustrate,—

2. **The Receipt of the Thing**—is, in general, the consummation of the crime, and it is indictable at the place of such receipt.[34] So that where one in a county in this country transmits a letter abroad containing a false pretence, and the thing is sent to him at the place of the writing, and indictment is maintainable at such place.[35] And it is believed that the fact of the pretence being made or sent from here is immaterial;[36] as, where the pretence is uttered in one county, and the thing is delivered in another, and indictment is good in the latter.[37] Of course,—

28. Ante, §§ 84, 87, 89.

29. Archb. Crim. Pl. & Ev. (13th Lond. Ed.) 395.

30. Reg. v. Marsh, 1 Den. C. C. 505.

31. Rex v. Cartwright, Russ. & Ry. 106.

32. Vol. I, § 45 et seq.

33. Ib. §§ 53, 60a (2). And see New Crim. Law, II, § 486 (4).

34. Connor v. S., 29 Fla. 455, 30 Am. St. 126, 10 So. 891; Reg. v. Peters, 16 Q. B. D. 636, 16 Cox C. C. 36; S. v. Lichliter, 95 Mo. 402, 8 S. W. 720. And see S. v. Dennis, 80 Mo. 589.

35. Reg. v. Holmes, 12 Q. B. D. 23, 15 Cox C. C. 343. Contra Stewart v. Jessup, 51 Ind. 413, 19 Am. R. 739.

36. S. v. Shaeffer, 89 Mo. 271, 1 S. W. 293.

37. S. v. House, 55 Iowa, 466; Reg. v. Jones, 1 Den. C. C. 551, 1

3. **Innocent Agent.**—One acting through an innocent agent, or otherwise, may become answerable for this offense in a county in which he is not personally present.[38]

§ 198. **Restitution of the Property**—cannot be ordered as in cases of larceny,[39] either by the ancient common law or by the statute of 21 Hen. 8, c. 11. In England, of late, this is provided for by statutes not in force in our country,[40] though there are statutes in perhaps more than one of the States of the like sort.[41]

Eng. L. & Eq. 533, Temp. & M. 270. See Skiff v. P., 2 Par. Cr. 139, 147; Reg. v. Leach, Dears. 642, 36 Eng. L. & Eq. 589; C. v. Taylor, 105 Mass. 172.

38. Reg. v. Garrett, Dears. 232, 22 Eng. L. & Eq. 607, 6 Cox C. C. 260.

39. Post, §§ 755-763.

40. Roscoe Crim. Ev. (3d Lond. Ed.) 477; 2 Saund. (6th Ed.) 4th in notes; 1 Chit. Crim. Law, 7, 817; Reg. v. Stancliffe, 11 Cox C. C. 318; Reg. v. Goldsmith, 12 Cox C. C. 594, 8 Eng. Rep. 605; Reg. v. Justices of Cent. Crim. Ct., 17 Q. B. D. 598; Vilmont v. Bentley, 18 Q. B. D. 322; Reg. v. Justices of Cent. Crim. Ct. 18 Q. B. D. 314.

41. Huntzinger v. C., 97 Pa. 336.

For Child Murder, see Stat. Crimes; Coin, see Counterfeiting; Common Barratry, see Barratry; Common Drunkard, see Stat. Crimes; Common Gaming-House, see Gaming-House; Common Nuisance, see Nuisance; Concealment of Birth, see Stat. Crimes..

CHAPTER CVIII.

COMMON SCOLD.

Consult—for the law of this offense, New Crim. Law, I, §§ 540 (6), 943 (2), 1101-1105. For the indictment and other questions of procedure, Dir. & F., §§ 791, 792; Vol. I, § 335; Vol. II, §§ 470 (5), 494 (2). And compare, on the various questions, with the title Nuisance.

§ 199 **As to the Form of the Indictment,**—the decisions are not sufficiently numerous to exclude all doubts. But the material parts are, that at a time and place stated,[42] the defendant was a common scold, to the common nuisance, etc.

§ 200. 1. **The Words "Common Scold,"**—though general in meaning, are the proper and technical ones; nor, it appears, need the indictment descend beyond them into the particulars.[43] In Latin, it was ill, says the report, to say "*communis rixa,* a common scold, instead of *rixatrix.*"[44] The phrase "a common and turbulent brawler and sower of discord amongst her quiet and honest neighbors," etc., seems to have been adjudged insufficient;[45] though, in Pennsylvania, a charge that the defendant "openly and publicly, in the public highway, wicked, scandalous, and infamous words did utter in the hearing," etc., not saying "common scold," was held adequate.[46] But perhaps this may be deemed a nuisance of another sort.

2. **How conclude.**—It is probable that where the general form of allegation is employed, whatever the rule is in

42. Ante, § 103.

43. Vol. II, § 494 (2); New Crim. Law, I, § 1103 (2); Rex v. Urlyn, 2 Saund. (Wms. Ed.) 308 in notes; Com. v. Pray, 13 Pick. (Mass.) 359; Com. v. Pearson, 23 Pick. (Mass.) 280; Stratton v. Com., 10 Met. (Mass.) 217. See Rex v. Rogier, 1 B. & C. 272, 275.

44. Reg. v. Foxby, 6 Mod. 239.

45. Rex v. Cooper, 2 Stra. 1246.

46. C. v. Mohon, 52 Pa. 243, 91 Am. D. 153. Compare with C. v. Foley, 99 Mass. 497; and U. S. v. Royall, 3 Cranch, C. C. 620, 621.

other cases, the conclusion must be "to the common nuisance," etc.[47]

§ 201. **Particulars,**[48]—where the indictment is thus general, should be required.[49]

47. Rex v. Cooper, supra. And see post, § 863.

48. Vol. II, § 643 et seq.; Baker v. S., 53 N. J. L. 45, 20 A. 858; also holding that it is not necessary to allege specific facts. It is a habit of scolding which constitutes the crime. Whether this is a habit, and whether the habit has been practiced under such circumstances as to disturb the peace, is for the jury.

49. Rex v. Urlyn, 2 Saund. (Wms. Ed.) 308, in notes; ante, § 100.

For Compounding, see the several Indexes to this criminal-law Series. And see Dir. & F., §§ 123-127, 300.

CHAPTER CIX.

CONSPIRACY.

Consult—for the law of this offense, New Crim. Law, II, §§ 169-240; and the Index to New Crim. Law. Also the Index to Stat. Crimes. For the forms of the indictment, etc., Dir. & F., §§ 279-315. And see the Index to Vol. I, of this New Crim. Pro.

§ 202. **Extent of Subject, Difficult.**—Conspiracy is the most extended of the offenses, being connected with every form of wrong-doing. And the procedure is in some respects difficult, both from its variety, and because the offense itself has not always been well understood.

§ 203. **How Chapter divided.**—We shall consider, I. In General of the Indictment; II. The Evidence; III. Questions of Practice; IV. Specially in some Particular Forms of Conspiracy.

I. *In General of the Indictment.*

§ 204. 1. **In "Directions and Forms,"**—the title Conspiracy is very full, and it should be consulted in connection with the present chapter.

2. **Act and Intent**—Every crime consists of a combination of evil act and evil intent;[50] both of which must be alleged and proved.[51] But in most offenses, either the averment of the intent is involved in that of the act, so requires no separate setting out,[52] or it may be stated very briefly

50. New Crim. Law, I, §§ 204-206.

51. Vol. I, §§ 79, 80, 84, 98a, 127 et seq., 331; Vol. II, §§ 509, 519, 523, 525, 1052; Reg. v. Aspinall, 2 Q. B. D. 48, 56.

52. Vol. II, § 521; ante, § 74.

and simply;[53] the real difficulties being in the part of the indictment which concerns the act. All this is reversed in conspiracy. The combining of the two or more minds is the act, and at common law is the only act essential;[54] though in some States something more, such as the averment of overt acts, in made necessary by the statutes.[55] Hence the indictment for conspiracy charges—

3. (1) **A Combining**—of two or more minds.

4. (2) **The Purpose**—of the combining; which purpose, or intent, must be, in the words of the definition, "to do by concerted action something unlawful, either as a means or an end."[56] And the averment of it must be in terms which show that the combining to accomplish it is indictable.[57] Nearly all the practical difficulties in an indictment at common law for conspiracy concern this averment.

§ 205. First. *The Setting out of the Act:—*

I. **The Indictment charges**—as to the act, that, on, etc., at, etc., the defendant, to copy from Chitty's form,[58] "unlawfully and wickedly [or, if the conspiracy be malicious, say falsely and maliciously] did conspire, combine, confederate and agree together." A shorter form, which has been held good, "unlawfully did conspire and combine together."[59] And not improbably the words "unlawfully"[60]

53. Vol. II, §§ 521-525.

54. S. v. Setter, 57 Conn. 461, 14 Am. St. 121, 18 A. 782; Johnson v. S., 3 Tex. Ap. 590; Long v. P., 109 Ill. Ap. 197; Com. v. Ward, 92 Ky. 158, 17 S. W. 283, 13 Ky. L. 422.

55. New Crim. Law, I, § 432; II, §§ 191, 192; R. S. of U. S. § 5140; Wood v. S., 18 Vroom, 180; P. v. Flack, 125 N. Y. 324; Daly v. U. S., 95 C. C. A. 107, 170 F. 321.

56. New Crim. Law, II, § 171. "Contrary to law" is sufficient. P. v. Smith, 144 Ill. Ap. 129, affirmed in 239 Ill. 91, 87 N. E. 885. S. v. Slutz, 106 La. 182, 30 So. 298.

57. Pettibone v. U. S., 148 U. S. 197; Wood v. S., 18 Vroom, 461; C. v. Barnes, 132 Mass. 242; U. S. v. Reichert, 12 Saw. 643, 32 Fed. Rep. 142; Elsey v. S., 47 Ark. 572, 2 S. W. 337; P. v. Flack, 125 N. Y. 324, 26 N. E. 267; U. S. v. Moore (Ore. 1909), 173 F. 122.

58. 3 Chit. Crim. Law, 1145. To the like effect, Archb. Crim. Pl. & Ev. (19th Ed.) 1005.

59. Rex v. Gill, 2 B. & Ald. 204.

60. But see Reg. v. Aspinall, 2 Q. B. D. 48, 60.

and "combine" may also be omitted, but the author is not aware[60a] that the question has been decided.[61] The indictment proceeds, "to," etc., stating the purpose of the conspiracy—that is, the intent—which varies with the particular case. But,—

2. **Overt Acts.**—At common law, it need not go further and specify acts done in pursuance of the combination.[62]

§ 206. 1. **Such acts**—are, when the combining of the defendants in a common purpose has been shown, evidence, like their declarations, further establishing the conspiracy and illustrating its character.[63] And if the law gave to these acts no other effect, they should not be set out in the indictment; the province of which is to state facts, not evidence.[64] But each overt act is likewise a renewal of the conspiracy;[65] hence the pleader may lay it in the indictment if he chooses,[65a] and the prosecuting power has the

60a. It has been divided in Wright v. U. S., 48 C. C. A. 37, 108 F. 805 that "unlawfully did conspire" is enough and that "combine," "confederate," "agree together," or similar words, while usual and proper, may be dispensed with as they add nothing to the meaning of "conspire."

61. See, for various forms, Dir. & F. § 285; S. v. Mayberry, 48 Me. 218; S. v. Buchanan, 5 Har. & J. 317, 9 Am. D. 534; Reg. v. Lewis, 11 Cox C. C. 404; Smith v. P., 25 Ill. 17, 76 Am. D. 780; C. v. Putnam, 29 Pa. 296; Reg. v. Yates, 6 Cox C. C. 441; Rex v. Glennan, 26 How. St. Tr. 437; Reg. v. Mears, 2 Den. C. C. 79, 4 Cox C. C. 423.

62. Note to Rex v. Johnson, 2 Show, 1, 2; Rex v. Gill, 2 B. & Ald. 204; Rex v. Seward, 1 A. & E. 706; Rex v. Richardson, 1 Moody & R. 402; Reg. v. Kenrick, 5 Q. B. 49, Dav. & M. 208; P. v. Richards, 1 Mich. 216, 224, 51 Am. D. 75; S. v. Straw, 42 N. H. 393; New Crim. Law, II, § 192 (1); P. v. Smith, 144 Ill. Ap. 129, 87 N. E. 885; S. v. Bacon, 27 R. I. 252, 61 A. 653; U. S. v. Burkett, 150 F. 208; U. S. v. Stamatopoulos, 164 F. 524; U. S. v. Stone, 188 Fed. 836. Under Federal statute, overt act must be alleged. Ex parte Black, 147 Fed. 832; So, also, in, S. v. Barr (N. J. 1898), 40 A. 772.

63. Vol. II, §§ 1248, 1249; post, §§ 228-230; New Crim. Law, II, §§ 192, 193. And see Ib., I, § 636; C. v. Corlies, 8 Phila. 450.

64. Vol. II, §§ 514, 516; U. S. v. Ulrici, 3 Dil. 532; S. v. Duncan, 78 Vt. 364, 63 A. 225.

65. Vol. I, § 61 (3); C. v. Bartilson, 85 Pa. 482; P. v. Arnold, 46 Mich. 268, 9 N. W. 406.

65. Particularly of allegation not required. S. v. Loser, 132 Iowa, 419, 104 N. W. 337.

election, at the trial, to prove the allegation or treat it as surplusage.[66]

2. **Defects in the Indictment**—are not cured by a mere averment, in another part of it, of overt acts;[67] though there are cases which seem to hold otherwise.[68] Still, in just reason, all parts of an indictment are to be construed together; and if in one part an averment appears which supplies a defect in another, it will be effectual for such purpose.

§ 207. Secondly. *The Setting out of the Intent or Purpose*:—

1. **The Doctrine**—under this head is so blended with the law of the offense that of necessity it was somewhat considered in "New Criminal Law."[69] A conspiracy being an attempt to do something not yet accomplished, in reason the rule in other attempts applies to it; namely as the thing meant is not done, it need not, because it cannot, be set out with the particularity of an executed transaction, yet within practical limits the allegation should plainly notify the defendant what he is to answer to.[70] For example,—

66. New Crim. Law, II, §§ 192, 193; Wright v. Reg., 14 Q. B. 148; Rex v. Roberts, 1 Camp. 399, 2 Leach, 987, note. See S. v. Ormiston, 66 Iowa, 143, 23 N. W. 370; Brown v. U. S., 76 C. C. A. 31, 145 F. 1.

67. Reg. v. King, 7 Q. B. 782; C. v. Shedd, 7 Cush. 514; P. v. Arnold, 46 Mich. 268, 9 N. W. 406.

68. Rex v. Spragg, 2 Bur. 993, 999; Wright v. Reg., 14 Q. B. 148. And see Rex v. Rispal, 3 Bur. 1320; Twitchell v. C., 9 Pa. 211.

69. New Crim. Law, II, §§ 199-202.

70. Ante, §§ 74, 76, 77, 81, 82, 84, 85, 87-89, 92; Reg. v. Rowlands, 2 Den. C. C. 364, 5 Cox C. C. 466, 9 Eng. L. & Eq. 287; Brown v. S., 2 Tex. Ap. 115; Reg. v. Aspinall, 2 Q. B. D. 48, 60, 61; S. v. McKinstry, 50 Ind. 465. See Landringham v. S., 49 Ind. 186; P. v. Poindexter, 243 Ill. 68, 90 N. E. 261; Eacock v. S., 169 Ind. 488, 82 N. E. 1039; S. v. Bacon, 27 R. I. 252, 61 A. 653; Thomas v. U. S., 84 C. C. A. 477, 156 F. 897; U. S. v. Moore, 173 F. 122; Ching v. U. S., 55 C. C. A. 304, 118 Fed. 538. In an indictment for a conspiracy to commit a felony it is usually enough to describe the felony by its common law name. Lipschitz v. P., 25 Colo. 261, 53 P. 1111; S. v. Slutz, 106 La. 182, 30 So. 298. If this is not done facts constituting a felony must be alleged. Green v. McDougall, 199 U. S. 601, 26 S. Ct. 748; Lipschitz v. P., 25 Colo. 261, 53 P. 1111.

2. **To Cheat an Individual.**—To state the case oftenest occurring in our books, it is in England held sufficient to allege that the defendants conspired, etc., "by divers false pretences and subtle means and devices, to obtain and acquire to themselves, of and from F and G, divers large sums of money, of the respective moneys of the said F and G, and to cheat and defraud them respectively thereof;"[71] or, still more briefly, conspired, etc., "to cheat and defraud F. of his goods and chattels;"[72] the objection, not deemed valid, being that the contemplated means for effecting the cheat ought to be set out. On principle, and by the better American, authorities, contrary to others, where no statute has interposed to change the written rule, this form of allegation is beyond all just question adequate.

§ 208. **The Reason**—is, that it discloses every element of the offense, and as minutely as the circumstances permit. No indictment is ever required to charge one with what the law has not made a part of his crime; and when two or more combine to cheat another, they become guilty of a criminal conspiracy, though they have not even considered of the means. Hence, as agreed means are not essential to the offense, it would be a perversion of justice to require the prosecuting power to allege them,—to allege, indeed, what may not in fact exist.[73]

§ 209. **As Brief in Definition**—are some other kinds of offending, and they may be charged in as few words, and for the same reason; namely, that the short averment covers the whole offense, and in as minute a way as is practicable. Such are simple assault and battery,[74] barratry,[75] common

71. Rex v. Gill, 2 B. & Ald. 204.

72. New Crim. Law, II, § 200; Sydserff v. Reg., 11 Q. B. 245; s. p. Reg. v. Gompertz, 9 Q. B. 824. And see White v. Reg., 13 Cox C. C. 318, 15 Eng. Rep. 353.

73. Vol. II, § 516 (2); New Crim. Law, II, §§ 198-202; Rex v. Gill, 2 B. & Ald. 204, 205; Reg. v. Gompertz, 9 Q. B. 824, 838; S. v. Young, 8 Vroom, 184; U. S. v. Ulrici, 3 Dill. 532; S. v. Brady, 107 N. C. 822, 12 S. E. 325; Thomas v. P., 113 Ill. 531; S. v. Ormiston, 66 Iowa, 143, 23 N. W. 370; P. v. Arnold, 46 Mich. 268, 9 N. W. 406. And see ante, §§ 75, 78; P. v. Smith, 239 Ill. 91, 87 N. E. 885.

74. Ante, §§ 55-57.

75. Ante, §§ 98-101.

scold,[76] and some others. And where the trial judge deems that further information ought in justice to be given the defendant, he orders a note or bill of the particulars[77] Again,—

§ 210. 1. **Particulars in Allegation.**—Since every element which in law enters into the offense must be alleged,[78] whenever the averment of such an element properly admits of being individualized, this, in justice to the defendant, should be done in the indictment. Thus,—

2. **The Name of the Person to be cheated,**—if known, should be stated.[80] "And," said Tindal, C. J., "if the conspiracy was to cheat indefinite individuals,—as, for instances, those whom they should afterwards deal with, or afterwards fix upon,—it ought to have been described in appropriate terms; showing that the objects of the conspiracy were, at the time of making it, unascertained."[81] Or the indictment may disclose that the conspiracy was to cheat and defraud the public generally,[82] or the United States, or the State.[83]

§ 211. **The Thing meant to be obtained**—by the cheat need not be specified; not being essential to an identification of the transaction, or required to be known even to the defendants themselves.[84]

76. Ante, §§ 199, 200.

77. Vol. II, § 644 (2); Rex v. Hamilton, 7 Car. & P. 448; Reg. v. Rycroft, 6 Cox C. C. 76; Reg. v. Stapylton, 8 Cox C. C. 69.

78. Vol. I, §§ 77-88, 98a; ante, § 63 (1).

79. Ante, §§ 81, 207.

80. Ante, §§ 82, 84, 87, 89, 90; Reg. v. Parker, 3 Q. B. 292.

81. Reg. v. King, 7 Q. B. 782, 807. And see Reg. v. Peck, 9 A. & E. 686; Peck v. Reg., 1 Per. & D. 508; White v. Reg., 13 Cox C. C. 318, 15 Eng. Rep. 353; U. S. v. Marrin, 159 F. 767, affirmed Marrin v. U. S., 167 F. 951, 93 C. C. A. 351; Miller v. U. S., 66 C. C. A. 399, 133 F. 337.

82. C. v. Judd, 2 Mass. 329, 3 Am. D. 54; C. v. Harley, 7 Met. 506; McKee v. S., 111 Ind. 378, 12 N. E. 510. See Reg. v. Blake, 6 Q. B. 126; Reg. v. Aspinall, 1 Q. B. D. 730, 741, 744; P. v. Smith, 239 Ill. 91, 87 N. E. 885.

83. U. S. v. Upham, 2 Mont. 170; Reg. v. Blake, 6 Q. B. 126.

84. Reg. v. Blake, 6 Q. B. 126; C. v. Goldsmith, 12 Phila. 632. Compare with Reg. v. Parker, 3 Q. B. 292, 297, 2 Gale & D. 709.

§ 212. **"To Cheat and Defraud"**—are the proper words, so at least is "cheat," which is nearly or absolutely indispensable; for all cheating is "unlawful." [85] On the other hand, it was held inadequate to say that the defendants conspired "to deceive and defraud," etc. by obtaining goods without paying for them. For such transaction is, said Lord Denman, C. J. "not necessarily a fraud; the words might apply to the obtaining goods to sell on commission." [86]

§ 213. **"Cheat and defraud" with us—(Massachusetts doctrine).**—Some of our courts have applied this reasoning to the short form of allegation held good in England,[87] and adjudged it to be also bad. In Massachusetts, for example, it is so laid down; because, as Dewey, J. argued, "the charge of a conspiracy to cheat and defraud A does not, *ex vi termini*, import a criminal object. Cheating and defrauding are ambiguous terms, as well applicable to civil contracts as to injuries inflicted wholly by breach of criminal law. A man [forgetting the distinction between one man's cheating another and two or more conspiring to cheat him [88]] may cheat and defraud another in the sale of articles of merchandise, and yet the case be one of civil wrong merely." But, the reader perceives, a combination of men to do this is a criminal wrong, indictable under the name of conspiracy. "Therefore," continues the learned judge, "the means must also be set forth, that it may be seen that it was a conspiracy to effect the proposed object by illegal means." [89] Now,—

§ 214. **Blunder.**—This, which purports to be reasoning, overlooks and ignores the distinction between a proposed cheat by conspiracy, which is indictable, and the same without conspiracy, which is a mere civil wrong. And if

85. Dir. & F., § 291; P. v. Rathbun, 44. Misc. 88, 18 N. Y. Cr. 454, 89 N. Y. S. 746; S. v. Hellman, 42 Wash. 615, 85 P. 63.

86. Reg. v. Peck, 9 A. & E. 686, 692; Peck v. Reg., 1 Per. & D. 508.

87. Ante, § 207 (2).

88. New Crim. Law, II, §§ 178, 198, 202.

89. C. v. Shedd, 7 Cush. 514, 515, referring to C. v. Eastman, 1 Cush. 189, 48 Am. D. 596; C. v. Hunt, 4 Met. 111, 125, 38 Am. D. 346; U. S. v. Stone, 135 F. 392.

the law of Massachusetts really were what this language, afterward repeated in substance by another learned judge,[90] imports, there could be properly no such offense as conspiracy in this State. So that what we call conspiracy would be merely criminal attempt,[91] of the same nature with attempt by solicitation;[92] governed by the same principles, and by no other. But—

§ 215. **True Massachusetts Doctrine.**—The court, while making this confused statement of the law, gives no intimation of an intent to overrule what it had before laid down. "Without attempting to review and reconcile all the cases," said Shaw, C. J., speaking for this tribunal, "we are of opinion that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. We use the terms criminal or unlawful, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment. Of this character was a conspiracy to cheat by false pretences, without false tokens, when a cheat by false pretences only, by a single person, was not a punishable offense.[93] So a combination to destroy the reputation of an individual, by verbal calumny, which is not indictable. So[94] a conspiracy to induce and persuade a young female, by false representations, to leave the protection of her parent's house, with a view to facilitate her prostitution."[95]

90. C. v. Prius, 9 Gray, 127. And see C. v. Wallace, 16 Gray, 221; C. v. Fuller, 132 Mass. 563.

91. New Crim. Law, II, §§ 191, 194, 195, 198.

92. Ante, §§ 74-76.

93. Referring to C. v. Boyton, 3 Law Reporter, 295.

94. Referring to Rex v. Grey, 3 Harg. St. Tr. 519, 9 How. St. Tr. 127.

95. C. v. Hunt, 4 Met. 111, 123, 38 Am. D. 346. See, also, C. v. Ward, 1 Mass. 473; New Crim. Law, II, §§ 178, 180, 198, 202; Com. v. Rogers, 181 Mass. 184, 63 N. E. 421;

§ 216. **In some other of our States,**—the English form is discarded as in Massachusetts; [96] in a part of them, it is adjudged sufficient.[97] Whether, in any State besides Massachusetts, the English and better view of the law is maintained yet the English indictment held bad, is perhaps doubtful. In some, at least, the departure is in the law, and this necessarily requires a difference in the indictment.[98]

§ 217. **The Principles governing this Question**—are in the main stated in the foregoing sections, and are not disputed. All the facts which the law makes elements of the offense must be alleged, and with such certainty that the defendant will know what is the charge to which he must answer, that he may plead the indictment in bar of a future one, and that the court may see the criminality of what he is accused of and affix the punishment.[99] And in any State wherein the law, whether by statute or by judicial exposition, declines to hold persons indictable who simply conspire to cheat and defraud another of his lands and goods, before they have taken steps toward the cheat, or agreed on the means, the indictment must set out the step or the means thus made essential to the offense.[1] In accordance with these views,—

S. v. Powell, 121 N. C. 635, 28 S. E. 525; S. v. Wilson, 121 N. C. 650, 28 S. E. 416

96. New Crim. Law, II, § 201; S. v. Keach, 40 Vt. 113; S. v. Parker, 43 N. H. 83; S. v. Jones, 13 Iowa, 269; S. v. Potter, 28 Iowa, 554; S. v. Stevens, 30 Iowa, 391; Lambert v. P., 9 Cow. 578; March v. P., 7 Barb. 391; S. v. Roberts, 34 Me. 320; S. v. Hewett, 31 Me. 396; S. v. Mayberry, 48 Me. 218; P. v. Eckford, 7 Cow. 535; P. v. Brady, 56 N. Y. 182, 189.

97. New Crim. Law, II, § 201; S. v. Young, 8 Vroom, 184; S. v. Buchanan, 5 Har. & J. 317, 9 Am. D. 534; S. v. Brady, 107 N. C. 822, 12 S. E. 325.

Michigan. As to Michigan, see P. v. Richards, 1 Mich. 216, 223, 51 Am. D. 75; Alderman v. P., 4 Mich. 414, 69 Am. D. 321; P. v. Clark, 10 Mich. 310; P. v. Barkelow, 33 Mich. 455.

98. New Crim. Law, II, § 199; P. v. Brady, supra, at p. 189; Territory v. Carland, 6 Mont. 14.

99. C. v. Wallace, 16 Gray, 221; S. v. Keach, 40 Vt. 113; S. v. Potter, 28 Iowa, 554.

1. March v. P., 7 Barb. 391; S. v. Harris, 38 Iowa, 242; Landringham v. S., 49 Ind. 186; S. v. Crow-

§ 218. **Indictable done by One.**—If the conspiracy is to do what would be indictable were it done by one alone, all hold that the contemplated means need not be set out.[2] Still the instance must be particularized, and the like, according to rules already laid down.[3] It seems to be sufficient, within this requirement, to describe the purposed offense simply by its name,[4] with the name of the person to be injured thereby.[5] When it is not known by any name, its constituents must be stated.[6] And there may probably be named offenses which should be more minutely identified than by name.[7]

§ 219. **Either the Means or the End**—of the conspiracy[8] must appear in the indictment to be unlawful; both need not.[9]

§ 220. **The Unlawful End,**—in an indictment for conspiracy to cheat by statutory false pretences, sufficiently appears from the allegation that it was "to get and obtain, knowingly and designedly, by false pretences, of" the per-

ley, 41 Wis. 271, 22 Am. R. 719; S. v. Clary, 64 Me. 369; U. S. v. Donau, 11 Blatch. 168.

2. C. v. Shedd, 7 Cush. 514, 515; S. v. Crowley, 41 Wis. 271, 22 Am. R. 719; S. v. Sterling, 34 Iowa, 443; S. v. Hewett, 31 Me. 396; S. v. Bartlett, 30 Me. 132; S. v. Noyes, 25 Vt. 415; Thomas v. P., 113 Ill. 531.

3. Ante, §§ 207, 210, 211, 217.

4. S. v. Ripley, 31 Me. 386; C. v. Eastman, 1 Cush. 189, 224, 48 Am. D. 596; Alderman v. P., 4 Mich. 414, 69 Am. D. 321; Johnson v. P., 22 Ill. 314.

5. Ante, §§ 82, 210 (2).

6. Hartmann v. C., 5 Pa. 60. And see Reg. v. Rowlands, 2 Den. C. C. 364, 5 Cox C. C. 466, 9 Eng. L. & Eq. 287. It is immaterial that the cheat aside from the conspiracy is not a crime. S. v. Gannon, 75 Conn. 206, 52 A. 727.

7. Ante, § 82; Landringham v. S., 49 Ind. 186. And see S. v. McKinstry, 50 Ind. 465.

8. New Crim. Law, II, §§ 171, 175.

9. S. v. Harris, 38 Iowa, 242; S. v. Crowley, 41 Wis. 271, 22 Am. R. 719; P. v. Smith, 239 Ill. 91, 87 N. E. 885; P. v. Bird, 126 Mich. 131, 86 N. W. 127; P. v. Nall, 242 Ill. 284, 89 N. E. 1012; Chicago W. & V. Coal Co. v. P., 214 Ill. 421, 114 Ill. Ap. 75, 73 N. E. 770; S. v. Bacon, 27 R. I. 252, 61 A. 653; S. v. Messner, 43 Wash. 206, 86 P. 636; Perrin v. U. S., 94 C. C. A. 385, 169 F. 17; Benson v. U. S., 169 F. 17, 94 C. C. A. 399; P. v. Petheram, 64 Mich. 252, 31 N. W. 188. Means must be set out with particularity putting accused on notice. U. S. v. Raley, 173 Fed. 179.

son to be injured, certain of his property described, "with the intent then and there to cheat and defraud" him of the same.[10]

§ 221. **In a Conspiracy Lawful in Object,**—unlawful means must be set out.[11] And—

§ 222. **If the Conspiracy is Statutory,**—every element must be averred, and the legislative expressions sufficiently followed.[12]

§ 223. Thirdly. *Other Parts of the Indictment:*—

Where Overt Acts—are to be set out,[13] the form may be, after charging the conspiracy in the ordinary way, to add that afterward, on, etc., at, etc., "in pursuance of and according to the said conspiracy," etc., the defendants did so and so; and afterward, on, etc., at, etc., "in further pursuance of and according to the said conspiracy," etc., they did so and so.[14]

§ 224. **Disjunctive Averments**—as, that the defendants conspired falsely and maliciously to charge *or* cause to be charged one with crime, and falsely and maliciously to prosecute him *or* cause him to be prosecuted therefor[15]—are inadequate.[16]

10. Johnson v. P., 22 Ill. 314. And see P. v. Clark, 10 Mich. 310; C. v. Walker, 108 Mass. 309. See Chicago W. & V. Coal Co. v. P., 214 Ill. 421, 73 N. E. 770; P. v. Smith, 144 Ill. Ap. 129, 239 Ill. 91, affirmed 87 N. E. 885; Lanasa v. S., 109, Md. 602, 71 A. 1058.

11. C. v. Prius, 9 Gray, 127; Alderman v. P., 4 Mich. 414, 69 Am. D. 321; S. v. Burnham, 15 N. H. 396. And see S. v. Buchanan, 5 Har. & J. 317, 9 Am. D. 534; Com. v. Hann, 27 Pa. Sup. Ct. 33.

12. Ante, § 217; Elkin v. P., 28 N. Y. 177; U. S. v. Donan, 11 Blatch. 168; S. v. Clary, 64 Me. 369; S. v. Stevens, 30 Iowa, 391; S. v. McKinstry, 50 Ind. 465; Hazen v. C., 23 Pa. 355; U. S. v. Smith, 2 Bond, 323; Cole v. P., 84 Ill. 216, 219; U. S. v. Carpenter, 6 Dak. 294; U. S. v. Cruikshank, 92 U. S. 542; Chicago W. & V. Coal Co. v. P., 114 Ill. Ap. 75, 214 Ill. 421, 73 N. E. 770; P. v. Goslin, 73 N. Y. S. 520, 67 Ap. Div. 16.

13 Ante, § 205 (2), 206; C. v. O'Brien, 140 Pa. 555, 21 A. 385.

14. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 677, 678. And see 3 Chit. Crim. Law, 1145, 1146, and other places; Dealy v. U. S. 152 U. S. 539.

15. S. v. Gary, 36 N. H. 359, 363.

16. Vol. II, § 585.

§ 225. **More Conspirators than One,**—in the one combination, may, of course, be jointly indicted.[17] And not generally will the court direct that they be separately tried.[18] But if one of two dies, the living one may be indicted and tried;[19] and it is the same of a known conspirator where the other is unknown.[20] Probably it is competent to indict known and arrested conspirators separately, while yet the judge might interfere to prevent a procedure so inconvenient and unusual. Where one is separately charged, it must be averred that another or others conspired with him; one form being that the defendant's conspiracy was "with divers other persons to the jurors unknown."[21] But the New York court deemed that names of co-conspirators, though known, need not be mentioned; hence, where a name was alleged as unknown, yet truly the grand jury knew it, the indictment was not therefore ill.[22] According to a South Carolina case, if a *nolle prosequi* is entered as to one of two co-conspirators jointly indicted, there can be no conviction of the other,[23] but it is not probable this doctrine will be generally accepted in the States.

§ 226. **More than One Offense.**—To commit more than one offense may be the object of one conspiracy. Hence a count is not double which charges it so.[24]

17. Vol. II, § 468 (4); S. v. Bradley, 48 Conn. 535; Spies v. P., 122 Ill. 1, 3 Am. St. 320, 12 N. E. 865, 17 N. E. 898; S. v. Crowley, 41 Wis. 271, 22 Am. R. 719

18. Vol. II, § 1022.

19. Rex v. Nichols, 13 East. 412, note. P. v. Nall, 242 Ill. 284, 89 N. E. 1012.

20. Reg. v. Steel, Car. & M. 337, 2 Moody, 246; P. v. Sacramento Butchers' Protective Ass'n, 12 Cal. Ap. 471, 107 P. 712; International Harvester Co. of America v. Com., 137 Ky. 668, 126 S. W. 352.

21. Ib.

22. P. v. Mather, 4 Wend. 229, 265, 21 Am. D. 122.

23. S. v. Jackson, 7 S. C. 283. State need not prove all but must prove at least two guilty. Com. v. Sanderson, 40 Pa. Super. Ct. 416; P. v. Miles, 123 N. Y. S. 862, 881. Compare Looney v. P., 81 Ill. Ap. 370.

24. Ante, §§ 74 (3), 93; S. v. Sterling, 34 Iowa, 443; Hamilton v. P., 24 Colo. 301, 51 P. 425; Garland v. S., 112 Md. 83, 75 A. 631; S. v. Wilson, 121 N. C. 650, 28 S. E. 416, holding that it is proper to charge all conspirators with conspiring to commit the same crime, though each conspirator is charged with doing different overt acts in participation in the crime.

II. *The Evidence.*

§ 227. 1. **Multitudinous**—are the forms of the evidence; and even to the act of conspiring, which is the gist of the offense, it may be circumstantial [25] as well as direct. Thus,—

2. **Separate Acts**—by the defendants, yet tending to the one end, together with the relations of the doers to one another, and any other explanatory facts, constituting a body of circumstantial evidence, may be shown as justifying the jury in inferring a conspiracy whence they proceeded.[26] But, inferentially or otherwise, a connection between the acts must appear, or they will be inadequate.[27] This sort of evidence may be given in the first instance to establish the conspiracy; [28] or,—

25. Rex v. Parsons, 1 W. Bl. 392; Spies v. P., 122 Ill. 1, 3 Am. St. 320, 12 N. E. 865, 17 N. E. 898; P. v. Bentley, 75 Cal. 407, 17 P. 436; Martin v. S., 89 Ala. 115, 18 Am. St. 91, 8 So. 23. And see Vol. II, §§ 1073-1079; Collins v. S., 138 Ala. 57, 34 So. 993; Morris v. S., 146 Ala. 66, 41 So. 274; Bundy v. S., 95 Ark. 460, 130 S. W. 522; P. v. Moran, 144 Cal. 48, 77 Pac. 777; P. v. Woods, 147 Cal. 265, 81 Pac. 652; P. v. Long, 7 Cal. Ap. 27, 93 P. 387; In re Leroy v. S., 125 Ga. 240, 54 S. E. 125; P. v. Nall, 242 Ill. 284, 89 N. E. 1012; P. v. Straach, 144 Ill. App. 283, affirmed 88 N. E. 155; Sanderson v. S., 169 Ind. 301, 82 N. E. 525; Cook v. S., 169 Ind. 430, 82 N. E. 1047; S. v. Walker, 124 Iowa, 414, 100 N. W. 354; Brummett v. Com., 108 S. W. 861, 33 Ky. L. 355; S. v. Casto, 231 Mo. 398, 132 S. W. 1115; O'Brien v. S., 69 Neb. 691, 693, 96 N. W. 649; P. v. Miles, 123 App. Div. 862, 869, 10 N. Y. S. 510; S. v. Anderson, 92 N. Car. 732, 747; P. v. McKane, 143 N. Y. 455, 38 N. E. 950; S. v. Lewis, 51 Ore. 467, 94 Pac. 831; Ripley v. S., 51 Tex. Cr. 126, 100 S. W. 943.

26. U. S. v. Cole, 5 McLean, 513, 601; Reg. v. Murphy, 8 Car. & P. 297; Rex v. Cope, 1 Stra. 144; Reg. v. Blake, 6 Q. B. 126; Reg. v. Frost, 9 Car. & P. 129; Poindexter v. C., 33 Grat. 766; U. S. v. Newton, 52 Fed. 275; P. v. Flack, 125 N. Y. 324, 26 N. E. 267; C. v. O'Brien, 140 Pa. 555. 21 A. 385; S. v. Gannon, 75 Conn. 206, 52 A. 727; U. S. v. Breeze, 172 F. 402; S. v. Fields, 234 Mo. 615, 138 S. W. 518.

27. Jenks v. Lewis, Ware, 51; McAnally v. S., 74 Ala. 9; Ellzey v. S., 57 Miss. 827; McDonald v. P., 126 Ill. 150, 9 Am. St. 547, 18 N. E. 817; Spies v. P., 122 Ill. 1, 101-158, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320n; Archer v. S., 106 Ind. 426, 7 N. E. 225; Reinhold v. S., 130 Ind. 467, 470, 30 N. E. 306; Eacock v. S., 169 Ind. 488, 82 N. E. 1039; Lawrence v. S., 103 Md. 17, 63 Atl. 96; S. v. Anderson, 92 N. Car. 732, 737, 747.

28. Cases in last note but one; also Reg. v. Brittain, 3 Cox, C. C. 76.

§ 228. Combining—Acts and Confessions of Co-conspirator.—The combining may be made to appear by any competent testimony,[29] and then the separate acts and declarations of the co-conspirtors, including even persons not indicted, may be produced, on the principle explained in the first volume.[30] For when this sort of relationship exists between persons, the doings of one are in contemplation of law those of all.[31] But—

§ 229. Such Acts and Confessions—cannot, otherwise than as already explained,[32] be brought forward in the first instance to establish the conspiracy.[33] This sort of evi-

29. Reg. v. Frost, 9 Car. & P. 129; Parker v. S., 98 Ark. 575, 137 S. W. 253.

30. Vol. II, §§ 1248, 1249; 3 Greenl. Ev., § 94; Cooke v. P., 231 Ill. 9, 82 N. E. 863; Thomas v. U. S., 84 C. C. A. 477, 156 F. 897.

31. Hardin v. S., 4 Tex. Ap. 355; Peden v. S., 61 Miss. 267; Bowers v. S., 24 Tex. Ap. 542, 5 Am. St. 901; U. S. v. Mitchell, 1 Hughes, 439; U. S. v. Butler, 1 Hughes, 457; Phillips v. S., 26 Tex. Ap. 228, 8 Am. St. 471; Spies v. P., 122 Ill. 1, 3 Am. St. 320, 12 N. E. 865, 17 N. E. 898; P. v. Bentley, 77 Cal. 7, 11 Am. St. 225, 18 P. 799; Martin v. S., 89 Ala. 115, 18 Am. St. 91, 8 So. 23; Gibson v. S., 89 Ala. 121, 18 Am. St. 96, 8 So. 98; Tolliver v. S., 142 Ala. 3, 38 So. 801; Morris v. S., 146 Ala. 66, 41 So. 274; Easter v. S., 96 Ark. 629, 132 S. W. 924; P. v. Gregory, 120 Cal. 16, 52 Pac. 41; Porter v. P., 31 Colo. 508, 74 Pac. 879; S. v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. 23; Baldwin v. S., 46 Fla. 115, 35 So. 220; Carter v. S., 106 Ga. 372, 32 S. E. 345, 71 Am. St. 262n; P. v. Nall, 242 Ill. 284, 89 N. E. 1012; Raymond v. P., 226 Ill. 433, 80 N. E. 996; Card v. S., 109 Ind. 415, 419, 422, 9 N. E. 591; Eacock v. S., 169 Ind. 488, 82 N. E. 1039; Hinkle v. S., 174 Ind. 276, 91 N. E. 1090; S. v. Hogan, 145 Iowa, 352, 124 N. W. 178; S. v. Manning, 149 Iowa, 205, 128 N. W. 345; Com. v. Hunton, 168 Mass. 130, 132, 46 N. E. 404; S. v. Vaughan, 200 Mo. 1, 17, 98 S. W. 2; S. v. Byers, 16 Mont. 565, 41 Pac. 768; O'Brien v. S., 69 Neb. 691, 694, 96 N. W. 649; S. v. Kennard, 74 N. H. 76, 65 Atl. 376; P. v. Miles, 123 Ap. Div. 862, 876; P. v. McKane, 143 N. Y. 455, 470, 38 N. E. 950; Bauer v. S., 3 Okla. Cr. 329, 107 P. 525; Com. v. O'Brien, 140 Pa. St. 555, 561, 21 Atl. 385; S. v. Green, 40 S. Car. 328, 18 S. E. 933, 42 Am. St. 872; S. v. Kennard, 85 S. Car. 146, 67 S. E. 152; S. v. Dix, 33 Wash. 405, 74 Pac. 570; Weisenbach v. S., 138 Wis. 152, 119 N. W. 843; Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343; U. S. v. Francis, 144 Fed. 520.

32. Ante, § 227 (2).

33. Metcalfe v. Connor, Litt. Sel. Cas. 497, 12 Am. D. 340; Hightower v. S., 22 Tex. 605; Windover v. Robbins, 2 Tyler, 1, 4; S. v. George, 7 Ire. 321; U. S. v. Cole, 5 McLean,

dence is competent in other offenses likewise;[34] and in all, the rule is that the combination of wills in a common purpose being first shown, what is said and done by one becomes then admissible against the rest.[35] And the court determines when the combination is sufficiently established for this purpose.[36]

§ 230. **When the Transaction is ended,**—individual declarations, confessions, and acts are, of course, not in execution of the common purpose; therefore they are competent only against those from whom they proceed.[37] Nice questions arise as to when this condition of things is reached;[38] after a burglary by two, the confessions of one who retained the stolen goods were not received against the other.[39] But where, in larceny, the conspiracy extended as well to the

513; Osborne v. S. (Miss. 1911), 55 So. 52. Except perhaps as against the party making the confession. Com. v. Hunton, 168 Mass. 130, 132, 46 N. E. 404.

34. C. v. Tivnon, 8 Gray, 375, 69 Am. D. 248; Cornelius v. C., 15 B. Monr. 539; Malone v. S., 8 Ga. 408; Gardner v. P., 3 Scam. 83; Sheppard v. S. (Ala. 1911), 55 So. 514; S. v. Fields, 234 Mo. 615, 138 S. W. 518.

35. American Fur Company v. U. S., 2 Pet. 358; Glory v. S., 13 Ark. 236; S. v. Ross, 29 Mo. 32; S. v. Nash, 7 Iowa, 347; S. v. Soper, 16 Me. 293, 33 Am. D. 665; Rex v. Salter, 5 Esp. 125; Page v. Parker, 40 N. H. 47; Clinton v. Estes, 20 Ark. 216; Nevill v. S., 60 Ind. 308; U. S. v. McKee, 3 Dil. 546; U. S. v. McKee, 3 Dil. 551; U. S. v. Mitchell, 1 Hughes, 439; U. S. v. Butler, 1 Hughes, 457; Solander v. P., 2 Colo. 48; P. v. Saunders, 25 Mich. 119; S. v. Brady, 107 N. C. 822, 12 S. E. 325; U. S. v. Lancaster, 44 Fed. 896.

36. Windover v. Robbins, supra; Fouts v. S., 7 Ohio St. 471; C. v. Crowninshield, 10 Pick. 497; Stone v. P., 13 Hun, 263.

37. S. v. Dean, 13 Ire. 63; S. v. Thibeau, 30 Vt. 100; Thompson v. C., 1 Met. (Ky.) 13; Patton v. S., 6 Ohio St. 467. See S. v. Simons, 4 Strob. 266; Lynes v. S., 36 Miss. 617; S. v. Ross, 29 Mo. 32; Clinton v. Estes, 20 Ark. 216; Hunter v. C., 7 Grat. 641, 56 Am. D. 121, 800-4; S. v. Brown (Del. 1911), 80 A. 146; Handley v. S., 115 Ga. 584, 41 S. E. 992; Tarasinski v. S., 146 Wis. 508, 131 N. W. 839; Miller v. S., 139 Wis. 57, 88, 119 N. W. 580; Baker v. S., 174 Ind. 708, 93 N. E. 14; Tapscott v. Com., 140 Ky. 573, 131 S. W. 487; Hayden v. Com., 140 Ky. 634, 131 S. W. 521; S. v. Moeller, 20 N. D. 114, 126 N. W. 568.

38. See Mask v. S., 32 Miss. 405; Curry v. Kurtz, 33 Miss. 24; American Iron Mountain Co. v. Evans, 27 Mo. 552; Osborne v. S. (Miss. 1911), 55 So. 52.

39. S. v. Thibeau, 30 Vt. 100. And see Reg. v. Blake, 6 Q. B. 126.

dividing of the goods taken as to the theft, what one did between the stealing and the dividing was admitted against both.[40]

§ 231. **The Order of the Testimony**—is in all cases within the discretion of the presiding judge, though commonly he follows therein the established practice.[41] In practice, if the counsel for the prosecution opens to a general conspiracy, and it appears "manifest that no particular proof sufficient to affect the defendants is intended to be adduced," the judge will "stop the case *in limine.*" But when the counsel at the opening makes full promise to supply the missing link, it is within the discretion of the court, relying thereon,[42] to permit general evidence of an existing conspiracy to precede that affecting a particular one or all of the defendants.[43] Or should it be deemed to have been incompetent when admitted, it may be rendered unobjectionable by what is afterward proved.[44] Yet perhaps ordinarily the court will receive evidence only as the foundation for it is laid in prior testimony or in the record.[45]

40. Scott v. S., 30 Ala. 503, 509; Eggleston v. S., 59 Tex. Cr. 542, 128 S. W. 1105; Snelling v. S., 57 Tex. Ct. 416, 123 S. W. 610; O'Brien v. S., 69 Neb. 691, 96 N. W. 649. Pistol found in possession of conspirator when arrested properly admitted against defendant, S. v. Lem Woon, 57 Ore. 482, 112 P. 427, 107 P. 947.

41. See Vol. II, §§ 966, 966a; S. v. Fields, 234 Mo. 615, 138 S. W. 518; Easter v. S., 96 Ark. 629, 132 S. W. 924; S. v. Manning, 149 Iowa, 205, 128 N. W. 345.

42. Vol. II, § 966a (2).

43. The Queen's Case, 2 Brod. & B. 302, 310. And see Rex v. Hammond, 2 Esp. 719; Browning v. S., 30 Miss. 656; Butt v. S., 81 Ark. 173, 98 S. W. 723; Wiley v. S., 92 Ark. 586, 124 S. W. 249; P. v. Bunkers, 2 Cal. Ap. 197, 84 Pac. 364, 370; Hall v. S., 31 Fla. 176, 188, 189, 12 So. 449; Cook v. S., 169 Ind. 430, 82 N. E. 1047; S. v. Grant, 86 Iowa, 216, 53 N. W. 120; S. v. Mushrush, 97 Iowa, 444, 66 N. W. 746; O'Brien v. S., 69 Neb. 691, 694, 96 N. W. 649; S. v. Ward, 19 Nev. 297, 308, 10 Pac. 133, 7 Crim. L. Mag. 748; P. v. Miles, 123 Ap. Div. (N. Y.) 862, 108 N. Y. S. 510; S. v. Lewis, 51 Ore. 467, 94 Pac. 831; Schultz v. S., 133 Wis. 215, 113 N. W. 428; Cohen v. U. S., 157 Fed. 651, 85 C. C. A. 113.

44. Johnson v. S., 29 Ala. 62, 65 Am. D. 383.

45. And see Browning v. S., supra.

§ 232. **In One's own Favor.**—Whatever is of the *res gestae* is admissible, though proceeding from a defendant and tendered in his own behalf.[46] Thus, on one's trial for conspiring with another not arrested to defraud a third person, his defense being that he was the other's dupe, himself believing what he said, he was permitted to put in evidence a correspondence between himself and such supposed co-conspirator. "What the parties say at the time," observed Best, J., "is evidence to show how they acted."[47]

§ 233. 1. **Variance**—must be avoided;[48] as,—

2. **Name.**—An allegation of a conspiracy to defraud one named is not sustained by proof of the intent to defraud another,[49] or the public, or anybody whom the defendants could defraud.[50] So,—

3. **To Commit One Offense**—being the object of the conspiracy charged, proof that it was to commit another will not suffice.[51] But the manner of committing it may be shown in a form more minute than the allegation, or varying from it in non-essentials.[52] And if the parts of the charge are separable, no more need be proved than will simply constitute the offense; as, if the alleged purpose is "to prevent the workmen of C. from continuing to work," etc., it will be adequate to show the purpose as to any of the workmen.[53] Again,—

46. Vol. II, §§ 1083-1087. And see Reg. v. Vincent, 9 Car. & P. 275; S. v. Cardoza, 11 S. C. 195.

47. Rex v. Whitehead, 1 Car. & P. 67, 69 D. & R., N. P. 61.

48. Vol. II, § 484a et seq.

49. Reg. v. Steel, Car & M. 337, 2 Moody, 246; Lawrence v. S., 103 Md. 17, 63 A. 96; U. S. v. Marrin, 159 F. 767, affirmed Marrin v. U. S., 167 F. 951, 93 C. C. A. 351.

50. C. v. Harley, 7 Met. 506; Com. v. Manley, 12 Pick. (Mass.), 173; C. v. Kellogg, 7 Cush. 473. See U. S. v. Greene, 115 F. 343.

51. S. v. Hadley, 54 N. H. 224. And see Randolph v. S., 14 Ind. 232; Reg. v. Banks, 12 Cox C. C. 393, 5 Eng. Rep. 471; S. v. Loser, 132 Iowa, 419, 104 N. W. 337. Acts constituting an offense including intent must be alleged, U. S. v. Green, 136 F. 618. Indictment for conspiracy to suborn perjury need not allege subordination with technical precision, Williamson v. U. S., 207 U. S. 425, 28 S. Ct. 163.

52. Vol. II, §§ 488b-488e; Reg. v. Gompertz, 9 Q. B. 824; Regent v. P., 96 Ill. Ap. 189.

53. Rex v. Bykerdike, 1 Moody & R. 179.

§ 234. 1. **A Conspiracy to prosecute for Crime**—persons not guilty is not established by proof of a conspiracy to prosecute guilty ones, nor is such evidence admissible.[54] And—

2. **Sufficient in Degree**—must be the evidence,[55] affirmatively covering the whole charge.[56] If, for example, three persons are indicted for conspiring together, and the proof is that one conspired with one other, it not appearing with which one, all must be acquitted.[57] But a part only may be shown by the direct evidence, if the circumstances authorize the jury to infer the rest.[58] Thus,—

§ 235. 1. **Conduct.**—Where the alleged conspiracy was by two to cheat a third of his goods, and it was clearly proved as to one, evidence that the other was present when the fraud was consummated, received a part of the goods, and sold them under a fictitious name, was held to show such a connection between the two as to justify a verdict against both.[59]

2. **Other Instances**—of actual or attempted fraud may in proper circumstances be given in evidence, in support of the conspiracy on trial,[60] within explanations in the first volume.[61]

§ 236. 1. **Though the Venue**—in this offense as in all others must be proved,[62] evidence of what was done beyond

54. S. v. Walker, 32 Me. 195.

55. S. v. Simons, 4 Strob. 266; Reg. v. Hibbert, 13 Cox C. C. 82, 13 Eng. Rep. 433; Reg. v. Banks, 12 Cox C. C. 393, 5 Eng. Rep. 471.

56. Vol. II, §§ 1052, 1054; C. v. Kellogg, 7 Cush. 473; U. S. v. Smith, 2 Bond, 323.

57. Reg. v. Thompson, 16 Q. B. 832. See S. v. Adams, 1 Houst. Crim. 361; S. v. Gardner, 84 N. C. 732; Bundy v. S., 95 Ark. 460, 130 S. W. 522. So if two are tried for a conspiracy and one is acquitted, the other one must also be acquitted. S. v. Tom, 13 N. C. 569; U. S. v. Morris, Fed. Cases 15, 812.

58. Ante, § 227 (2); Reg. v. Banks, supra; S. v. Morton, 27 Vt. 310, 65 Am. D. 201.

59. C. v. Warren, 6 Mass. 74.

60. C. v. Eastman, 1 Cush. 189, 216; Luckey v. Roberts, 25 Conn. 486; P. v. Saunders, 25 Mich. 119; Rex v. Hunt, 3 B. & Ald. 566; U. S. v. Russell, 19 Fed. 591.

61. Vol. II, §§ 1120-1129.

62. U. S. v. Jackalow, 1 Black. 484.

the jurisdiction of the court is still competent to the other parts of the charge.[63] And—

2. **An Overt Act,**—within the county, the effect whereof is to renew the conspiracy there, is adequate evidence of the venue.[64]

III. *Questions of Practice.*

§ 237. **If the Indictment is in Several Counts,**—yet one conspiracy only is proved, a verdict of guilty may be taken on all the counts which set out the offense in accordance with the evidence.[65]

§ 238. **A Special Verdict,**—not responding to all the material parts of the indictment, will be ill.[66] When adequately responsive and full, judgment will be rendered thereon.[67]

§ 239. **The Questions of Separate Trial,**—and some connected ones, are not quite the same in conspiracy cases as in others. But they have been already considered.[68]

IV. *Specially in some Particular Forms of Conspiracy.*

§ 240. **To Charge with Crime.**—The indictment may aver that the defendants, on, etc., at, etc., devising not only to deprive X of his good name, but also to subject him without just cause to the pains and penalties provided for per-

63. Rex. v. Bowes, cited 4 East, 171.

64. Vol. I, § 61 (3); ante, § 206 (1); Rex v. Brisac, 4 East, 164, 170, 171; C. v. Corlies, 3 Brews. 575, 578, 8 Philad. 450; P. v. Arnold, 46 Mich. 268, 9 N. W. 406; P. v. Mather, 4 Wend. (N. Y.) 429, 21 Am. Dec. 122; Dawson v. S., 38 Tex. Cr. 9, 40 S. W. 731.

65. Reg. v. Gompertz, 9 Q. B. 824.

66. Vol. II, §§ 1005-1006a; P. v. Olcott, 2 Johns. Cas. 301, 1 Am. D. 168.

67. C. v. Judd, 2 Mass. 329, 3 Am. D. 54.

67. See, among other places, Vol. II, §§ 464 (2), 468 (4), 1019 (5), 1022, 1038 (2); ante, § 225. And see Cummins v. C., 81 Ky 465; Bradshaw v. Territory, 3 Wash. Ter. 265, 14 P. 594; P. v. Richards, 67 Cal. 412, 56 Am. R. 716, 7 P. 828; Casper v. S., 47 Wis. 535, 2 N. W. 1117; Paul v. S., 12 Tex. Ap. 346. See S. v. Smith, 55 Ore. 408, 106 P. 797.

sons guilty of [rape], did then and there conspire, etc., falsely to charge and accuse him the said X that he the said X had then lately before [feloniously ravished and carnally known a woman named Y, violently and against her will and consent]; adding, if deemed important, overt acts.[69]

§ 241. 1. **"Falsely Conspired"**—would be equally well with the above "falsely to charge." And it need not be added that X was innocent.[70] So,—

2. **Where Fornication and Adultery**—are not indictable, it is still a crime to conspire falsely to charge one with what is so prejudicial to good morals; as, with being the father of a bastard child. The indictment need not aver that he is not the father.[71]

§ 242. 1. **Labor Conspiracies,**—including conspiracies among workmen, conspiracies to injure one in his business, and the like, are pretty minutely considered in the author's "Directions and Forms," to which reference here is specially made.[72]

2. **The Indictment,**—in States where overt acts are not required to be set out, may be brief; and it should conform to the special purpose of the conspirators in the individual instance, and the pleader's view of the law. For a conspiracy to prevent one's working at his trade, it was in England held good simply to charge the purpose to be, "by indirect means, to impoverish the said X, and to deprive and hinder him from following and exercising his aforesaid trade or business of a tailor." And Buller, J., said that the words "by indirect means" were unnecessary; the means being matter of evidence.[73]

69. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 672, 673; 3 Chit. Crim. Law, 1171, 1174-1179; Dir. & F., § 300, where some explanations and varied forms appear; C. v. Andrews, 132 Mass. 263; Johnson v. S., 2 Dutcher, 313; C. v. O'Brien, 12 Cush. 84; Elkin v. P., 28 N. Y. 177; S. v. Hadley, 54 N. H. 224.

70. Johnson v. S., 2 Dutcher, 313; Rex v. Spragg, 2 Bur. 993.

71. Reg. v. Best, 2 Ld. Raym. 1167, 6 Mod. 137, 1 Salk. 174.

72. Dir. & F., §§ 301-308.

73. Rex v. Eccles, 3 Doug. 337, 339. But compare this with C. v. Hunt, 4 Met. 111, 38 Am. D. 346. And see Morris Run Coal Co. v.

3. **The Conspiracy of Boycott,**—both as to the law and the procedure, has been considered in some cases to which it will suffice here simply to refer.[74]

§ 243. **For a Conspiracy to defraud the Public,**—the form is substantially the same as where an individual is to be defrauded;[75] but it does not, for it cannot, set out the names.[76]

§ 244. **Where the Defilement**—of a female,[77] or the procuring of an unlawful marriage,[78] is the object of the conspiracy, no special difficulties attend the allegation. If the marriage is not valid, the woman can be a witness against her seducer.[79]

§ 245. **Against the Public Revenue**—are some of the conspiracies in our books, the forms of procedure for which will not be here specially considered.[80] And the same may

Barclay, Coal Co., 68 Pa. 173, 8 Am. R. 159; Reg. v. Rowlands, 2 Den. C. C. 364, 5 Cox C. C. 466, 9 Eng. L. & Eq. 287; P. v. Sheldon, 139 N. Y. 251, 34 N. E. 785. As to the evidence, Rex v. Ferguson, 2 Stark. 489. For a form of conviction, see Ex parte Perham, 2 Ellis & E. 383. See also, S. v. Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760. A charge of conspiracy to prevent, hinder, and deter several persons named by violence, threats and intimidation from continuing a business named is sufficient at common law. S. v. Duncan, 78 Vt. 364, 63 A. 225, 4 L. R. A. (N. S.) 1144, 112 Am. St. 922.

74. S. v. Gliddon, 55 Conn. 46, 3 Am. St. 23, 8 A. 890; Crump v. C., 84 Va. 927, 10 Am. St. 895, 6 S. E. 620, in which two cases the authorities are cited and explained. Davis v. Zimmerman, 36 N. Y. S. 303.

75. For forms, see S. v. Trammel, 2 Ire. 379; C. v. Judd, 2 Mass. 329, 3 Am. D. 54; S. v. Cardoza, 11 S. C. 195; S. v. Bienstock (N. J. Sup. 1909), 73 A. 530. See, as to an indictment for conspiracy to defraud persons unknown. Miller v. U. S., 66 C. C. A. 399, 133 Fed. 337; see, also, P. v. Smith, 144 Ill. Ap. 129, 87 N. E. 885.

76. Ante, § 210 (2).

77. Reg. v. Mears, 2 Den. C. C. 79, 1 Eng. L. & Eq. 581; Smith v. P., 25 Ill. 17, 76 Am. D. 780. See S. v. Trice, 88 N. C. 627.

78. Respublica v. Hevice, 2 Yeates, 114; S. v. Savoye, 48 Iowa, 562.

79. Respublica v. Hevice, supra.

80. See, for example, U. S. v. Nunnemacher, 7 Bis. 111; U. S. v. Goldberg, 7 Bis. 175; U. S. v. Dustin, 2 Bond, 332; U. S. v. McKee, 3 Dil. 546; P. v. Saaunders, 25 Mich. 119; U. S. v. Ulrici, 3 Dil. 532; Reg. v. Blake, 6 Q. B. 126.

be said of conspiracies otherwise to defraud the United States.[81]

81. U. S. v. Crafton, 4 Dil. 145; Ex parte Shaffenburg, 4 Dil. 271; U. S. v. Donau, 11 Blatch, 168; U. S. v. Gordon, 22 Fed. 250. And see Rex. v. Hedges, 28 How. St. Tr. 1315; U. S. v. Greene, 115 F. 343.

For Contempt of Court, see Dir. & F., §§ 316-329; Conveyances, Fraudulent, see Dir. & F., §§ 481-487; Corruption in Elections, see Dir. & F., §§ 382-400; Counselling, see Dir. & F., 105, 106, 114-117, 119-121; Counterfeit Money, see the next chapter; also Forgery.

CHAPTER CX.

COUNTERFEITING AND THE LIKE AS TO COIN.

Consult—for the law of these offenses, New Crim Law, II, §§ 274-300. For the indictment, etc., Dir. & F., §§ 330-344. And for various collateral things, see the indexes to this series of books.

§ 246. **Fragmentary**—are the elucidations in this chapter, like those in the corresponding one in "New Criminal Law;" rendering necessary their examination in connection with the chapters in that work, and in this on the Forgery of Writings.

§ 247. **How Chapter divided.**—We shall consider, I. Counterfeiting the Coin; II. Passing Counterfeit Coin; III. Uttering Counterfeit Coin having Other in Possession; IV. Having Counterfeit Coin in Possession with Intent to Pass it; V. Possessing or Making the Instruments for Counterfeiting; VI. Some Remaining Questions.

I. *Counterfeiting the Coin.*

§ 248. **Statutory**—are practically with us all indictments for this offense; for which reason, and because it is not certainly indictable anywhere among us at common law, no attempt will here be made to supply a common law form.[82]

§ 249. **Falsely Making.**—Under the English 2 Will. 4, c. 34, § 3,[83] for punishing one who shall "falsely make or

82. New Crim. Law, II, §§ 281, 284-387; Dir. & F., § 331.

83. Now 24 & 25 Vict. c. 99, § 2.

counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin;" adding that "every such offense shall be deemed to be complete although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected,—an approved form of the indictment was that on, etc., at, etc., the defendant "ten pieces of false and counterfeit coin, each piece thereof resembling, and apparently intended to resemble and pass for, a piece of the queen's current gold coin called a sovereign, falsely and feloniously did make and counterfeit." [84]

§ 250. **Compared with Forgery.**—It is seen that this form, in its manner of setting out the thing counterfeited, differs totally from what is required in forgery of writings, where the very words of the instrument must be given.[85] Still, the description here, "the queen's current gold coin called a sovereign," is, when the full import of the words is considered, exact and complete.

§ 251. **For Treason of Counterfeiting.**—The old statute of 25 Edw. 3, stat. 5, c. 2, made it treason to "counterfeit the king's money." And a form of indictment thereon was that the defendants, "contriving and intending our said lord the king and all his people craftily, falsely, deceitfully, feloniously, and traitorously to deceive and defraud," on, etc., at, etc., "twenty pieces of false, feigned, and counterfeit money and coin, of copper, brass, and other mixed metals, of the likeness and similitude of the good, legal, and current money and gold coin of our said lord the king, of this realm, called guineas, then and there falsely, deceit-

84. Archb. Crim. Pl. & Ev. 10th Lond. Ed. 501. And see Reg. v. Blaby, 1894, 2 Q. B. 170. Not necessary to aver the intent to pass the coin as true. U. S. v. Peters, 2 Abb. U. S. 494. For a form, see U. S. v. Otey, 12 Saw. 416, 31 Fed. Rep. 68. And for forms under our American statutes generally, see Dir. & F., §§ 332-335. For Gilding,—to produce the color of gold, contrary to 2 Will. 4, c. 34, § 16, see Reg. v. Turner, 2 Moody, 42. And see Dir. & F., § 336.

85. Post, § 403 et seq.

fully, feloniously, and traitorously did forge, counterfeit, and coin."[86]

§ 252. **Describing the Coin.**—Hale says the indictment "ought to show particularly what kind of coin, namely, groats or shillings. But although it is usual to express the numbers of each kind, yet it is not of absolute necessity."[87]

§ 253. 1. **It is legally Sufficient,**—though slightly inaccurate, to say, "ten pieces of false, forged, and *counterfeit* coin and money, etc., unlawfully and feloniously did forge, make, and *counterfeit,*" etc.[88] But,—

2. **Repugnant.**—To charge the counterfeiting of a good and legal coin of "the State of Missouri," "called a Mexican dollar," is bad, because repugnant.[89]

§ 254. *The Evidence:*—

1. **Circumstantial.**—Not often is direct testimony attainable, but commonly the offense is made out by circumstantial evidence; "as," says Archbold, "finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, some in an unfinished, state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited, or caused to be counterfeited, or was present aiding and abetting in counterfeiting, the coin in question."[90] Yet in one case it was deemed not enough to show that the defendant once or twice a week visited coiners, that the rattling of money was heard while he was with them, that once after coming out he was discovered counting something, that when their rooms were visited just after their arrest he resisted being stopped and jumped over a wall to escape, and that some bad money was then found upon him.[91] The jury may infer a counterfeiting from the

86. 2 Chit. Crim. Law, 104. A similar method of describing the coin was held good in C. v. Stearns, 10 Met. 256.

87. 2 Hale P. C. 187.

88. S. v. Griffin, 18 Vt. 198. And see S. v. McPherson, 9 Iowa, 53.

89. S. v. Shoemaker, 7 Mo. 177.

90. Archb. Crim. Pl. & Ev. 10th Lond. Ed. 501, 502.

91. Rex v. Isaacs, 1 Russ. Crimes, 5th Eng. Ed. 208.

instruments for it and large quantities of spurious coin being found unexplained in the defendant's possession.[92] On a charge of counterfeiting, it is not necessary to prove an intent to pass.[93]

2. **Variance**—"between the indictment and the evidence, in the number of the pieces of coin alleged to be counterfeited, is immaterial; but a variance as to the denomination of such coin, as guineas, sovereigns, shillings, etc., would be fatal."[94] And—

§ 255. **A Description**—of the false coins as "fifty cent pieces" and "twenty-five cent pieces," instead of "half dollars" and "quarter dollars," which are the statutory words, involves a fatal variance. No proof of the existence of the genuine coin need be given, being presumptively known to the court and jury.[95]

§ 256. **Other Evidence**—is explained under the analogous title Forgery of Writings.

II. *Passing Counterfeit Coin.*[96]

§ 257. **The Cheat.**—The procedure for the cheat through counterfeit coin as a false token, at common law and under the false-pretence statutes,[97] belongs to other chapters. But—

§ 258. 1. **The Knowingly Passing**—of counterfeit coin is, under State and national statutes, a separate offense in the nature of counterfeiting.[98]

2. **The English Indictment**—under 2 Will. 4, c. 34, § 7, the words of which are "shall tender, utter, or put off any

92. U. S. v. Burns, 5 McLean, 23; U. S. v. King, 5 McLean, 208.

93. S. v. McPherson, 9 Iowa, 53.

94. Archb. ut sup. But see contra, U. S. v. Burns, 5 McLean, 23; Fed. Cases 14691.

95. U. S. v. Burns, 5 McLean, 23; U. S. v. King, 5 McLean, 208. "United States gold coin" is equivalent to "gold coin of the United States;" it is current by law; and without allegation and proof, both court and jury take cognizance that a gold coin of the denomination and value of ten dollars is an eagle. Daily v. S., 10 Ind. 536. See also Reg. v. Connell, 1 Car. & K. 190.

96. Dir. & F., §§ 337-340.

97. New Crim. Law, II, §§ 147, 148, 286, 448.

98. Ib., §§ 282, 285; R. S. of U. S., § 4557.

false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit," is, by an approved form, that on, etc., at, etc., the defendant "one piece of false and counterfeit coin resembling a piece of the queen's current gold coin called a sovereign, unlawfully, falsely, and deceitfully did utter to one N, he the said [defendant], at the time he so uttered the said piece of false and counterfeit coin, [then and there[99]] well knowing the same to be false and counterfeit."[1]

§ 259. 1. **With Us,**—this form need only be adjusted to the terms of our statute to be good.[2] Thus,—

2. **The Name**—of the person to whom the coin was uttered must in general be averred, and proved at the trial.[3] But under the statutory words "with intent to defraud any person whatsoever," it was held sufficient to set out this person's name only, omitting that of him to whom the coin was passed.[4]

3. **The Charge of Uttering**—must be positive, "did utter;" its omission is not supplied by the conclusion of the *scienter*.[5]

4. **Scienter.**—"Knowing the same to be false and counterfeit" is sufficient; and "knowing" will be referred to the antecedent which will make sense, and render the indictment good.[6]

5. **"Dollars"**—sufficiently designates the coin.[7]

99. Not essential. Reg. v. Page, 2 Moody, 219, 9 Car. & P. 756.

1. Archb. Crim. Pl. & Ev. 10th Lond. Ed. 509.

2. For various forms, see Dir. & F., §§ 337-340. As to Delaware, see S. v. Johnson, 3 Harring. (Del.) 561; Indiana, McGregor v. S., 16 Ind. 9; Ohio, Leonard v. S., 29 Ohio St. 408.

3. 1 Russ. Crimes, 5th Eng. Ed. 231; Gabe v. S., 1 Eng. 540; Rouse v. S., 4 Ga. 136, 139, 140. But see Gentry v. S., 6 Ga. 503.

4. U. S. v. Bejandio, 1 Woods, 294.

5. S. v. Halder, 2 McCord, 377. Here the omission simply of the word "did" before "utter" was held to be fatal.

6. Reg. v. Jones, 9 Car. & P. 761; Reg. v. Page, 9 Car. & P. 756, 2 Moody, 219; Vol. I, §§ 355, 356; Vol. II, §§ 510-512.

7. Peck v. S., 2 Humph. 78; Fight v. S., 7 Ohio, 1st pt. 180, 28 Am. D. 626. See Reg. v. Connell,

6. **"Base"—"Adulterated"**—are equivalents. And under the statutory expression "base *or* adulterated," "base *and* adulterated" was held not repugnant in the indictment.[8]

7. **That the Coin was Current**—in the State must be alleged or not, according to the terms of the statute. In Ohio, it was deemed unnecessary, and, when inserted, mere surplusage.[9] In Alabama, it must be inserted, with averment of time.[10]

8. **"Feloniously,"**—where this offense is misdemeanor, is not required in the allegation;[11] how, where it is felony, may be seen in the first volume.[12]

§ 260. *The Evidence:—*

1. **The "Uttering," "Putting Off," or "Passing"**—of the coin, whichever term is used in the statute and the indictment, must be proved.[13] As there is a difference in the meaning of these words,[14] the practitioner should attend to it when drawing the allegation and at the trial. "Where a good shilling was given to a Jew boy for fruit, and he put it into his mouth under pretence of trying whether it were good, and then taking a bad shilling out of his mouth, instead of it, returned it to the prosecutor, saying that it was not good; this (which is called ringing the changes) was holden to be an uttering within the meaning of the statute 15 Geo. 2, c. 28."[15] It would be a passing also, if accepted; an uttering, whether accepted or not.

2. **Variance**—must be avoided; as, under 8 & 9 Will. 3, c. 26, § 6, it being alleged that five counterfeit shillings were paid and put off for two shillings, and the proof was

1 Car. & K. 190; C. v. Stearns, 10 Met. 256.

8. Gabe v. S., supra.

9. Smith v. S., 8 Ohio, 294.

10. Nicholson v. S., 18 Ala. 529, 54 Am. D. 168. And see S. v. Shoemaker, 7 Mo. 177; New Crim. Law, II, §§ 295-298.

11. Wilson v. S., 1 Wis. 184.

12. Vol. II, §§ 533-527.

13. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 509, 510. U. S. v. Weikel, 8 Mont. 124, 19 Pac. 396.

14. Stat. Crimes, §§ 306-308.

15. Archb. ut sup., referring to Rex v. Franks, 2 Leach, 644.

that five bad shillings were sold for half a crown, this was held to be fatal; for a contract must be proved as laid.[16]

3. **The Similitude,**—or intent to have the counterfeit resemble and pass for the genuine, must be satisfactorily shown.[17]

§ 261. 1. **The defendant's Knowledge**—that the coin was counterfeit must be affirmatively proved; the evidence of which will be generally circumstantial.[18] Thus,—

2. **Other Utterings—Possession.**—Other utterings, by the defendant, of base coin of the same or even a different species or denomination,[18a] made at a time not too remote, whether before or after;[19] or the prior, simultaneous, or subsequent possession of such coin[20] or of the coining instruments[21] by him; may properly be considered by the jury on the questions of knowledge and intent.[22] Its effect is for them.[23]

16. Rex v. Joyce, Car. Crim. Law, 3d Ed. 184. Compare with ante, §§ 120, 161; Rex v. Hedges, 3 Car. & P. 410.

17. New Crim. Law, II, § 291; Reg. v. Byrne, 6 Cox C. C. 475; S. v. McKenzie, 42 Me. 392, 394; P. v. Osmer, 4 Park. Cr. (N. Y.) 242, 244. Confederate note does not bear similitude to U. S. currency within the statute. U. S. v. Kuhl, 85 F. 624. Circular metal tokens, agreeing in color but differing in size, design and weight not purporting to be money but being good for certain merchandise do not come under similitude clause. U. S. v. Roussopulous, 95 F. 977. As to bills issued by a bank for circulation, U. S. v. Conners, 111 F. 734.

18. Archb. ut sup.

18a. Reg. v. Forster, Dears. 456, 6 Cox C. C. 521; s. c. nom. Reg. v. Foster, 29 Eng. L. & Eq. 548; S. v. Tindal, 5 Harr. (Del.) 488, 490; Steele v. P., 45 Ill. 152, 157; McCartney v. S., 3 Ind. 353, 56 Am. Dec. 510; Com. v. Bigelow, 8 Metc. (Mass.) 235, 236; Com. v. Stearns, 10 Met. (Mass.) 256, 258; Hendrick's Case, 5 Leigh (Va.) 707; S. v. Cole, 19 Wis. 129, 134, 88 Am. Dec. 678; U. S. v. Noble, 5 Cranch C. C. (U. S.) 371, 27 Fed. Cas. 15895.

19. Reg. v. Forster, supra; Stalker v. S., 9 Conn. 314, 343; Rex v. Salt, 3 Fost. & F. 834; Rex v. Whiley, 2 Leach, 983. See Payson v. Everett, 12 Minn. 216.

20. Stalker v. S., supra; Harrison's Case, 2 Lewin, 118; McGregor v. S., 16 Ind. 9; Peek v. S., 2 Humph. 78.

21. S. v. Antonio, 2 Tread. 776, 3 Brev. 562.

22. Vol. II, §§ 1120-1128.

23. Tharp v. S., 15 Ala. 749, 756, 757. See, also, S. v. Odel, 2 Tread. 758, 3 Brev. 552.

3. **Intent to defraud.**—If, by the particular statute, an intent to defraud is made an element of the offense, it may be presumed from the passing for value to an innocent person.[24]

§ 262. **Producing Counterfeit at Trial.**—It is believed that a counterfeit coin is within the rule which requires the production of a writing in controversy at the trial,[25] subject to the well-known exceptions. It is excused, for example, if the person to whom it was passed resides out of the State, and he has been subpoenaed, but has not appeared.[26]

III. *Uttering Counterfeit Coin having Other in Possession.*

§ 263. 1. **In England**—the statutes[27] make it a special offense for one to utter counterfeit coin having other in possession; and it is believed that this sort of legislation prevails in a few of our States.

2. **The Indictment**—sets out the uttering as before described,[28] and avers the possession of the other coin.[29] It need not conclude that the defendant was a common utterer.[30]

§ **264. On the Evidence,**—we have various English cases, but none are believed to involve principles specially important to the present elucidations.[31]

24. McGregor v. S., 16 Ind. 9.

25. S. v. Phelps, 2 Root, 87, 88; S. v. Orsborn, 1 Root (Conn.) 152; Armitage v. S., 13 Ind. 441; S. v. Potts, 9 N. J. L. 26, 17 Am. Dec. 449.

26. Kirk v. C., 9 Leigh. 627.

27. 2 Will. 4, c. 34, § 8, now superseded by 24 & 25 Vict. c. 99, § 9.

28. Ante, § 258 (2).

29. Archb. Crim. Pl. & Ev. 10th Lond. Ed. 510, 19th Ed. 814; Dir. & F., § 340.

30. Rex v. Smith, Russ. & Ry. 5, 2 Leach, 856, 858, 1 East P. C. 183.

31. Rex v. Else, Russ. & Ry. 142; Rex v. Manners, 7 Car. & P. 801; Reg. v. Jones, 9 Car. & P. 761; Reg. v. Smith, 2 Den. C. C. 449, 452; Rex v. Skerrit, 2 Car. & P. 427; Reg. v. Gerrish, 2 Moody & R. 219; Reg. v. Rogers, 2 Moody, 85; Reg. v. Hurst, 2 Moody & R. 360; Reg. v. Williams, Car. & M. 259; Reg. v. Greenwood, 2 Den. C. C. 453. These cases may be found stated in Archb. Crim. Pl. & Ev. 19th Lond. Ed. 510, 19th Ed. 813, 814.

IV. *Having Counterfeit Coin in Possession with Intent to pass it.*

§ 265. 1. **By the Common Law**—this is not an offense, because not involving a sufficient act.[32] It is made punishable by statutes in England and generally in this country.

2. **English Indictment.**—Under 2 Will. 4, c. 34, § 8, the words of which are, "shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same," it was an approved form to say that on, etc., at, etc., the defendant "four pieces of false and counterfeit coin, resembling the queen's current silver coin called shillings, unlawfully, falsely, and deceitfully had in his custody and possession, with intent to utter the said pieces of false and counterfeit coin, he the said [defendant] then and there[33] well knowing the said pieces of false and counterfeit coin to be false and counterfeit."[34]

§ 266. **Our American Forms**—are modelled after this one, simply varied to meet the somewhat differing terms of the statutes.[35] No allegation of value is required.[36] Nor is any averment of the materials of which the counterfeit was made.[37]

§ 267. *The Evidence:—*

Where the Possession of a Given Number—of pieces, more than the law requires to constitute the offense, is averred, proof of less, but not less than is legally adequate, will suffice.[38] And proof of more will equally sustain the allegation.[39]

32. New Crim. Law, I, § 304 (2).

33. "Then and there" not essential. Ante, § 258 (2) and note.

34. Archb. Crim. Pl. & Ev. 10th Lond. Ed. 513.

35. C. v. Stearns, 10 Met. 236; C. v. Fuller, 8 Met. 313, 41 Am. D. 509; S. v. Williams, 8 Iowa, 533; S. v. Griffin, 18 Vt. 198; Scott v. C., 14 Grat. 687; P. v. Stanton, 39 Cal. 698; Sizmore v. S., 3 Head, 26.

36. S. v. Williams, supra.

37. S. v. Griffin, supra. For forms see Dir. & F., § 341; U. S. v. Bicksuer, 1 Mackey, 341; S. v. Keneston, 59 N. H. 36.

38. Vol. II, § 488b (4).

39. S. v. Pepper, 11 Iowa, 347.

§ 268. 1. **Other Instances,**—as ground for presuming knowedge and intent, of possessing, uttering, and the like, may be shown, in the manner already explained.[40] And—

2. **The Defendant,**—on his side, may prove that he received the coin accidentally, or in the usual course of busness.[41]

3. **Acting in Concert—possession.**—Where two or more are acting in concert, the possession of one, with the knowledge of the others, is the possession of all.[42]

V. *Possessing or Making the Instruments for Coining.*

§ 269. 1. **The Indictment**—for this offense is in like form with that for making or possessing the false coin. And it must cover the terms of the particular statute. In Tennessee, it was adjudged adequate under the State legislation, and deemed probably so on common law principles, to say that on, etc., at, etc., the defendant "did feloniously and fraudulently, and without any lawful excuse, keep in his possession a machine, which said machine was then and there intended by the prisoner for the foregoing and counterfeiting the coin current by law and usage in the State of Tennessee and the United States;" the objection urged being that the coin to be counterfeited was not sufficiently specified.[43] The Indiana court held that the name of the instrument or some description of it should be given.[44]

40. Ante, § 261 (2); C. v. Starns, 10 Met. 256; P. v. Farrell, 30 Cal. 316; Rex v. Fuller, Russ. & Ry. 308, 310.

41. U. S. v. Kenneally, 5 Bis. 122.

42. Reg. v. Rogers, 2 Moody, 85; Reg. v. Williams, Car. & M. 259.

43. Bradford v. S., 3 Humph. 370. And see S. v. Bowman, 6 Vt. 594; Harlan v. P., 1 Doug. Mich. 207; Reg. v. Richmond, 1 Car. & K. 240, 1 Cox C. C. 9; S. v. Collins, 3 Hawks, 191; C. v. Kent, 6 Met. 221; C. v. Morse, 2 Mass. 128; Reg. v. Roberts, Dears. 539, 7 Cox C. C. 39, 33 Eng. L. & Eq. 553; Rex v. Catapodi, Russ. & Ry. 65; P. v. McDonnell, 80 Cal. 285, 13 Am. St. 159, 22 P. 190; Long v. S., 10 Tex. Ap. 186; Rex v. Moore, 1 Moody, 122.

44. Chamberlain v. S., 5 Blackf. 573. But see, as to Illinois, Miller v. P., 2 Scam. 233. "One die or instrument for the purpose of," etc., is sufficient in Virginia. C. v. Scott, 1 Rob. Va. 695.

2. **Another Form**—may be found in "Directions and Forms."[45]

3. "**Knowingly,**"—if in the statute, must be also in the indictment;[46] but no further averment of the *scienter* is necessary.[47]

4. **Use of Instrument.**—Where the indictment is for the use of the instrument, the Arkansas court holds that the manner of the use must be stated; the simple allegation that the defendant fraudulently used, it not being sufficient.[48]

§ 270. *The Evidence*:—

1. **It must establish,**—as in other offenses, enough of the allegation to constitute legal guilt, but it need do no more; as where, under 8 & 9 Will. 3, c. 26, § 1, the possession of a die made of iron and steel was charged, proof of either metal was adjudged adequate, the kind being immaterial.[49] And the evil intent proved need be only what will simply cover the terms of the law.[50]

2. **Other Connected Offenses**—may, within principles already explained,[51] be shown. When, therefore, the charge was that the prisoner had in possession a mould on which were impressed the figure and apparent resemblance of the obverse side of a half crown, and he occupied a house wherein the mould was found, evidence that a fortnight before he had passed a bad half crown was held competent, though it did not appear whether or not this half crown was made in this mould.[52]

VI. *Some Remaining Questions.*

§ 271. 1. **A Second or Third Offense,**—of some of those explained in this chapter, is, by the English and a part of

45. Dir. & F., § 342.

46. Chamberlain v. S., 5 Blackf. 573.

47. Sutton v. S., 9 Ohio, 133.

48. Bell v. S., 5 Eng. 536.

49. Rex v. Oxford, Russ. & Ry. 382, 383; 1 Russ. Crimes, 5th Eng. Ed. 222; Rex v. Phillips, Russ. & Ry. 369, 371.

50. Reg. v. Harvey (Law Rep.), 1 C. C. 284, 11 Cox C. C. 662.

51. Ante, §§ 261 (2), 268 (1).

52. Reg. v. Weeks, Leigh & C. 18, 8 Cox C. C. 455.

the American statutes, made more heavily punishable than the first. There are cases illustrating the procedure,[53] but it is sufficiently explained in "New Criminal Law."[54]

2. **"Common Utterer."**—Though the statute should declare the offender to be "a common utterer," the indictment need not aver that he is.[55]

3. **Joinder of Counts.**—Under United States statutes, counts charging the making of false coin, assisting in the making, and procuring it to be made, may be joined.[56]

4. **The Indictment should conclude**—against the peace of the State or the United States, according as it is under the statutes and in the tribunal of the one or the other.[57]

53. Rex v. Turner, 1 Moody, 47; Rex v. Michael, Russ. & Ry. 29, 2 Leach, 938; Rex v. Booth, Russ. & Ry. 7; Reg. v. Thomas (Law Rep.), 2 C. C. 141; Reg. v. Jones, 9 Car. & P. 761; Rex v. Tandy, 2 Leach, 833; Reg. v. Goodwin, 10 Cox C. C. 534, overruled in Reg. v. Martin (Law Rep.), 1 C. C. 214.

54. New Crim. Law, I, §§ 959-965.

55. Rex v. Smith, 2 B. & P. 127; Vol. II, § 515 (2).

56. U. S. v. Burns, 5 McLean, 23. And see R. S. of U. S., §§ 1024, 1025.

57. Harlan v. P., 1 Doug. (Mich.) 207.

Cruelty to Animals, see Stat. Crimes, §§ 1099-1122; New Crim. Law, I, §§ 594-597a; Dir. & F., §§ 345-362; Vol. I, of this work, § 356 (2); Vol. II, § 629 (2).

Dead Bodies, see Sepulture.

Defilement of Women, see Conspiracy—Rape—Seduction and Abduction, etc.

Disobeying Judicial Order, see Dir. & F., §§ 322, 323.

CHAPTER CXI.

DISORDERLY HOUSE.

Consult—the title Nuisance (this offense being one of the nuisances), and the titles of the several nuisances there referred to, specially Bawdyhouse. Also, for the law of this offense, New Crim. Law, I, §§ 1105a-1121, and the indexes to the several volumes of this Criminal Law Series. For the form of the indictment, etc., Dir. & F., §§ 793-795.

§ 272. **How Chapter divided.**—We shall consider, I. The Indictment; II. The Evidence; III. The Verdict.

I. *The Indictment.*

§ 273. **The Form of Indictment**—given under the title Bawdyhouse,[58] varied to describe the disorderly conduct in the particular instance, is, for any disorderly house, in substance the same which the books generally supply.[59]

58. Ante, § 105 (2).

59. 2 Chit. Crim. Law, 39, 40; Archb. Crim. Pl. & Ev. (19th Eng. Ed.) 960, 962; S. v. Bailey, 1 Fost. (N. H.) 343; Rex v. Higginson, 2 Bur. 1232; U. S. v. Milburn, 4 Cranch C. C. 719; Cable v. S., 8 Blackf. 531; C. v. Kelly, 12 Gray, 175; C. v. Donovan, 16 Gray, 18; C. v. Ballou, 124 Mass. 26; S. v. Reckards, 21 Minn. 47; Smith v. C., 6 B. Monr. 21; S. v. Flynn, 35 Tex. 354; Thatcher v. S., 48 Ark. 60, 2 S. W. 343; S. v. Dame, 60 N. H. 479, 49 Am. R. 331; McElhaney v. S., 12 Tex. Ap. 231. In Mains v. S., 42 Ind. 327, 13 Am. R. 364, a form in substance the same which is generally accepted in England and our other States was adjudged inadequate, on the ground that it did not sufficiently show the acts charged to be a public nuisance. It "does not," observed the learned judge, allege that the house "was situate in any public place, as in a city, town, or village, nor near any public street or highway; nor does it allege that any person resided near thereto, or was in the habit of passing thereby. In short, there is nothing

§ 274. **"For Lucre."**—It being immaterial in law what was the motive for the keeping, the allegation that it was for lucre, commonly found in the precedents, is unnecessary.[60]

§ 275. **How Minute.**—There are passages in the older books indicating that simply to charge the defendant with keeping a disorderly house, not descending to particulars, is sufficient.[61] But the contrary is now established; something more specific, it may not be possible to define how much, yet, at least, showing or stating the nature of the disorder,—or, as the expression sometimes is, "specific acts,"—must be alleged and proved.[62]

§ 276. 1. **If the General Averment**—that the defendant

in the indictment which shows that the house was in the vicinity of any inhabitants, or that any person ever came near it save those who congregated there by the alleged procurement of the appellant. In the language of the counsel for the appellant, 'for aught that appears, it may have been in the woods, away from the sight and hearing of every citizen of the State.'" N. C. 328. If the indictment had contained no allegation that persons from without ever entered or were permitted in the house for disorderly conduct, it would plainly have set out no offense, according to common doctrine. New Crim. Law, I, §§ 1078, 1109. But this operating from within on people without, which the indictment under consideration did charge, completes the offense, according to what is generally held, even supposing the house to have been remote from other habitations. New Crim. Law, I, §§ 1107, 1111; C. v. Cobb, 120 Mass. 356. Compare Hickey v. S., 53 Ala. 514. The difference of opinion, therefore, seems to relate to the law itself.

60. New Crim. Law, I, § 1112; ante, § 108 (1); S. v. Bailey, 1 Fost. (N. H.) 343; S. v. Porter, 130 Iowa, 690, 107 N. W. 923.

61. 2 Hawk. P. C. c. 25, § 57; Davis Prec. 140, 198; Rex v. Rogier, 1 B. & C. 272, 275; C. v. Pray, 13 Pick. 359, 362; Rex v. Dixon, 10 Mod. 335; Rex v. Mason, 1 Leach, 487, 491, 493.

62. Ante, § 105 (2); Leary v. S., 39 Ind. 544; Mains v. S., 42 Ind. 327, 13 Am. R. 364; Hickey v. S., 53 Ala. 514; Hosea v. S., 47 Ind. 180; Taylor v. C., 1 Duv. 160; Stephens v. S., 21 Tex. 206; Vanderworker v. S., 13 Ark. 700; P. v. Jackson, 3 Denio, 101, 45 Am. D. 449; Frederick v. C., 4 B. Monr. 7, 9. And see C. v. Stewart, 1 S. & R. 342; C. v. Davenport, 2 Allen, 299; S. v. Miller, 5 Blackf. 502; C. v. Crupper, 3 Dana, 466; Rex v. Higginson, 2 Bur. 1232; McElhaney v. S., 12 Tex. Ap. 231; S. v. Dame, 60 N. H. 479, 49 Am. R. 331.

kept a disorderly house is followed by the specific one that it was for common bawdry, common tippling, common gaming, or the like, one step will thus be taken toward the minute; and to hold it enough would reconcile with the better doctrine cases which else must be rejected.[63] But it is believed that most courts require the description of the use to extend further. Still,—

2. **The Names of the Frequenters**—need not be given.[64]

3. **The Conclusion**—"to the common nuisance" has been adjudged unnecessary.[65] But the question is more minutely considered under the title "Nuisance."[66]

4. **The Terms of the Statute,**—where the offense is statutory, must be taken into the account, and they will sometimes modify the allegations[67] and the other procedure.[68]

§ 276 a. "House"—"Tenement."—The common law forms have the words "disorderly *house;*"[69] for the latter of which "tenement" has been held an inadequate substitute,[70] but it is right where the indictment is on a statute employing it.[71]

§ 277. Joinder of Counts.—Counts for the offense at common law and under a statute may be joined.[72]

63. See the first note to the last section; ante, § 105 (2).

64. S. v. Patterson, 7 Ire. 70, 45 Am. D. 506; ante, § 107 (1); S. v. Raymond, 86 Mo. Ap. 537.

65. S. v. Wilson, 93 N. C. 608.

66. Post, §§ 862-864.

Under a statute declaring places for the illegal sale of liquor, etc., to be common nuisances all prohibited acts need not be alleged or proved. One is enough. S. v. Arsenault, 106 Me. 192, 76 A. 410.

67. Springer v. S., 16 Tex. Ap. 591; S. v. Sheridan, 14 Vroom, 484; S. v. Botkin, 71 Iowa, 87, 60 Am. R. 780; Harmes v. S., 26 Tex. Ap. 190, 8 Am. St. 470; Dutton v. Ter., 13 Ariz. 7, 108 P. 224.

68. Baton Rouge v. Cremonini, 36 La. Ann. 247; S. v. McLorinan, 14 Vroom, 410.

69. Ante, § 273. See Killman v. S., 2 Tex. Ap. 222, 28 Am. R. 432.

70. C. v. Wise, 110 Mass. 181.

71. C. v. Welsh, 1 Allen, 1, compared with Mass. Gen. Stats. c. 87, § 6; C. v. Bulman, 118 Mass. 456, 19 Am. R. 469. See C. v. McCaughey, 9 Gray, 296. Com. v. Clark, 145 Mass. 251, 13 N. E. 888.

72. C. v. Kimball, 7 Gray, 328; C. v. Ismahl, 134 Mass. 201. And see Wooster v. S., 55 Ala. 217, overruling Norvell v. S., 50 Ala. 174.

II. *The Evidence.*

§ 278. **That the Defendant is the Keeper**—of the house must be shown,[73] not necessarily by direct evidence, it may be circumstantial.[74] And he may rebut a *prima facie* case, when made against him.[75] Ownership of the house as real estate does not necessarily imply a keeping; and on an indictment for the unlicensed sale of confectionery, proof that the title to the land was in trustees to the use of the defendant's wife was held in admissible.[76]

§ 279. 1. **Opinions of Witnesses**—that the house is a nuisance will not be received.[77] But—

2. **Former Instances**—of like conduct at the house, with the defendant's permission, by the same persons, are admissible as showing his knowledge.[78]

§ 280. 1. **Doings outside the House,**—too remote to be within the presumable knowledge[79] of the keeper and inmates, cannot be shown against him.[80]

2. "**The Usual Evidence,**"—it has been said, "is of such noises" in the house "as to make it a nuisance;[80a] but it

73. Ante, § 118 (1); Nelson v. Ter., 5 Okla. 512, 49 P. 920. See S. v. Foley, 45 N. H. 466. And consult ante, §§ 112-117.

74. S. v. Worth, R. M. Charl. 5; Griffin v. P., 44 Colo. 533, 99 Pac. 321; P. v. Saunders, 29 Mich. 269; Ponder v. S., 115 Ga. 831, 42 S. E. 224; S. v. Schaffer, 74 Iowa, 704, 39 N. W. 89; Stone v. S., 47 Tex. Cr. 575, 85 S. W. 808; Machen v. S., 53 Tex. 115, 109 S. W. 126; S. v. Horn, 83 Mo. Ap. 47; Stratton v. S. (Tex. 1903), 44 S. W. 506; Kessler v. S., 119 Ga. 301, 46 S. E. 308. Ownership cannot be proved by reputation. Moore v. S., 53 Tex. Cr. 559, 110 S. W. 911; Owens v. S., 53 Tex. Cr. 1, 108 S. W. 379.

75. Couch v. S., 24 Tex. 557.

76. Williamson v. S., 16 Ala. 431.

77. Smith v. C., 6 B. Monr. 21.

78. Vol. II, §§ 1120-1128; Parker v. P., 94 Ill. Ap. 348; Parker v. Green, 2 B. & S. 299. Evidence that a tenant of defendant had kept same premises as a disorderly house subsequently to defendants keeping rejected in Howard v. P., 27 Colo. 396, 61 P. 595.

79. Ante, § 118.

80. C. v. Davenport, 2 Allen, 299. But see Delaney v. S., 22 Vroom, 37.

80a. It may be shown that gaming, drinking and other misbehavior occurred with the acquiescence of the proprietor, that the place was kept in a manner to encourage such conduct, that the pro-

may also be incidentally shown by proof of quarrelling and fighting, or of breaking in by persons whom it is attempted to keep out, or breaking out by those whom it is attempted to keep in." It is relevent, for example, to show that doors were broken while the defendant occupied the house.[81]

§ 281. 1. **Acts not charged.**—Though specific acts are set out, others which are not may be shown under the more general averments of the indictment.[82] Yet the former must also be proved.[83] And—

2. **Only the Substance of the Issue,**—as to the form of the disorder appearing in the allegation,[84] need, it seems, be proved.[85]

3. **Court—Jury.**—What constitutes a disorderly house is determined as of law by the court. The jury finds, as of fact, whether or not the defendant permitted such repeated infractions of order as to render his house within the ruling of the court disorderly.[86]

§ 282. **Proof of License—(Statutory Offense).**—On an indictment against a licensed person for keeping his house in a disorderly manner, contrary to the requirement of the

prietor participated in it; that such misbehavior was necessarily connected with the offense charged, and the number and kind of people who frequent the house may be shown and their actions in the house. Com. v. Soo Hoo Doo, 41 Pa. Super. Ct. 249; Robbins v. S. 60 Tex. Cr. 523, 132 S. W. 770; P. v. Jones, 129 A. D. 772, 113 N. Y. S. 1097; S. v. Kelly, 76 N. J. L. 576, 70 A. 342. (Reputation of female inmates.) Wimberly v. S., 53 Tex. Cr. 11, 108 S. W. 384; Derby v. S., 60 N. J. L. 258, 37 A. 614. (Also holding that such evidence cannot be considered to show the connection of accused with the house.) S. v. Cambron, 20 S. D. 282, 105 N. W. 241; Bindernagel v. S., 60 N. J. L. 307, 37 A. 619, 61 N. J. L. 259, 38 A. 973, 39 A. 36, 41 A. 109.

81. C. v. O'Brien, 8 Gray, 487. For other evidence, see S. v. Robertson, 86 N. C. 628.

82. Ante, § 107; Garrison v. S., 14 Ind. 287; Frederick v. C., 4 B. Monr. 7, 9.

83. Ante, § 275; Frederick v. C., supra.

84. Vol. II, §§ 488b, 488c.

85. Lord v. S., 16 N. H. 325, 41 Am. D. 729; Belasco v. Hannant, 3 B. & S. 13.

86. Brown v. S., 20 Vroom, 61; Fahnestock v. S., 102 Ind. 156, 1 N. E. 372; Bindernagel v. S., 60 N. J. L. 307, 37 A. 619, 61 N. J. L. 259, 38 A. 973, 39 A. 36; S. v. McGahan, 48 W. Va. 438, 37 S. E. 573.

statute, the license, being an element in the offense, must be alleged [87] and proved. But it was held that the written instrument of license need not be produced, or notice to produce it be shown; the entry on the journals of the court granting it, or the fact of the defendant's keeping the house, being adequate.[88]

III. *The Verdict.*

§ 283. **A Special Verdict,**[89]—"that the defendant kept a disorderly house and disturbed his neighbors," was adjudged insufficient; because a disorderly house is not indictable unless a common nuisance, and because a house may be disorderly without being injurious except to its inhabitants, while the essence of the offense is the injury to the public.[90]

87. Davis v. S., 52 Ind. 488.

88. Baldwin v. S., 6 Ohio, 15.

89. As to the nature of the special verdict and how it differs from the general, see Vol. II, §§ 1006, 1006a.

90. Hunter v. C., 2 S. & R. 298. Compare with ante, § 273, note.

CHAPTER CXII.

DISTURBING MEETINGS.

Consult—for the law of this offense, New Crim. Law, I, 542; II, 301-310a. For the indictment and the like, Dir. & F., §§ 363-372. For various incidental things, see the indexes to this Criminal Law Series.

§ 284. **How Chapter divided.**—We shall consider, I. In General and at Common Law; II. Statutory Disturbances.

I. *In General and at Common Law.*

§ 285. 1. **The Common Law Indictment**—in legal principle should aver, besides its formal parts, that on, etc., at, etc., the defendant did, by means or in a manner so fully set out as to show his act to be of the indictable sort and apprise him of what he is to answer to, disturb a meeting so designated or described as to appear on the face of the allegation to be one whereof the disturbance is punishable.[91] To accept less would contravene familiar and fundamental rules of criminal pleading. The precedents and adjudications do not seem opposed to this view as to the meeting; but as to the disturbance,—

2. **Allegation of Disturbance.**—It was in Pennsylvania held adequate simply to say that the defendants "did willfully and maliciously disturb and interrupt a meeting of," etc., followed by no specification of methods or acts.[92] But in Texas this short averment was, "upon the well-settled

91. New Crim. Law, I, § 542; II, §§ 308, 309.

92. Campbell v. C., 59 Pa. 266. Disturbing any lawful assembly is an offense at common law. S. v. Watkins (Ky. 1910), 130 S. W. 839; S. v. Branner, 149 N. C. 559, 63 S. E. 169.

general principles of the law governing indictments," judged inadequate, though the indictment was on a statute, which probably did not vary the question. It should be more specific as to the acts.[93] In accord with the Pennsylvania doctrine,—

3. "**Disturb**"—"**Interrupt**"—"**Obstruct.**"—Widely in the forms seemingly deemed good, the only averment of the criminal act, or only one apparently regarded as material, is that the defendant unlawfully, etc., "did disturb and obstruct," or "did disturb and interrupt," or "did disturb and hinder," the meeting or the officiating person; though a part of the forms proceed further.[94] If the brief allegation is sufficient, it is, in principle, equally so merely to say that the defendant kept a disorderly house,[95] or committed larceny[96] of goods named, or murdered Richard Jones.[97] Consistently with this view it has been held that the disturbance may be alleged by the general character of the disturbing acts, without descending to details.[98]

§ 286. **As to the Meeting,**—it is believed that all the approved forms set it out in a way showing it to be one wherein the offense can be committed: for example, "in the Ebenezer Baptist Church there, during the celebration of divine service;"[99] "in the parochial church there, at the time of

93. Thompson v. S., 16 Tex. Ap. 159. And see Dir. & F., §§ 364-367.

94. 2 Chit. Crim. Law, 21; P. v. Degey, 2 Wheeler Crim. Cas. 135; S. v. Horn, 19 Ark. 578; Rex v. Hube, 5 T. R. 542; Rex v. Parry, Trem. P. C. 239; C. v. Hoxey, 16 Mass. 385; U. S. v. Brooks, 4 Cranch C. C. 427; Kidder v. S., 58 Ind. 68; Bush v. S., 5 Tex. 64.

95. Ante, § 275.

96. Vol. I, § 331 (2).

97. And see Vol. II, §§ 508-510, 514-516. This view is fully sustained by the reasoning, and almost by the very case passed upon, in Rex v. Cheere, 4 B. & C. 902, 7 D. & R. 461.

98. S. v. Hinson, 31 Ark. 638; Kindred v. S., 33 Tex. 67; Cockreham v. S., 7 Humph. 11; Bush v. S., 5 Tex. Ap. 64; S. v. Ringer, 6 Blackf. 109; S. v. Stubblefield, 32 Mo. 563. Precise language used by accused need not be set out. Sufficient to say he cursed and used profane and indecent language. Minter v. S., 104 Ga. 743, 30 S. E. 989. Indictment must allege acts and that they were calculated to produce a disturbance. S. v. Booe, 62 Ark. 512, 37 S. W. 47.

99. P. v. Degey, 2 Wheeler Crim. Cas. 135.

the celebration of divine service;"[1] "the congregation of the African meeting-house in Washington county aforesaid, then and there in the said house assembled for and engaged in the worship of God;"[2] "a certain meeting of the school directors of St. Clair township, in said county, they the said school directors being then and there lawfully assembled for the purpose of discharging their duty as school directors for the said township of St. Clair."[3] Simply to say "a religious assembly commonly called a quarterly-meeting conference" has been adjudged ill as being too indefinite; the charge should be that the assembly had met for "divine worship," "divine service," "religious worship or service," or something of the like import.[4] Where the words of a statute were "any meeting of inhabitants of this State, met together for any lawful purpose," an indictment thereon describing the meeting as "a certain collection of divers inhabitants of the State of Indiana, met together as a singing-school," was adjudged inadequate.[5]

1. Rex v. Parry, Trem. P. C. 239.

2. U. S. v. Brooks, 4 Cranch C. C. 427. As to Texas, 38 Tex. Cr. 319, 43 S. W. 86; Edwards v. S., 121 Ga. 590, 49 S. E. 674.

3. Campbell v. C., 59 Pa. 266. Compare S. v. Ellis, 71 Mo. Ap. 269. Allegation that meeting was held for a lawful purpose, necessary. S. v. Steele, 74 Mo. Ap. 5. It is enough to allege in the language of the statute that the meeting was lawfully and peaceably assembled, or otherwise to follow the words of the statute, and special facts need not be alleged. Von Bruden v. S., 96 Wis. 671, 675, 71 N. W. 1048. Indictment need not set out place was set apart for religious worship. S. v. Alford, 142 Mo. Ap. 412.

4. S. v. Fisher, 3 Ire. 111. And see S. v. Jones, 53 Mo. 486. Meeting for instruction in singing of religious songs is not a religious assemblage within the statute. Adair v. S., 134 Ala. 183, 32 So. 326. But one may be guilty of disturbing a religious assembly though not a part of it. Adair v. S., 134 Ala. 183, 32 So. 326. See, also, Cox v. S., 136 Ala. 94, 34 So. 168. A congregation "is assembled for public worship" while its members are near the place of worship preparing and eating dinner. Minter v. S., 104 Ga. 743, 30 S. E. 989; Folds v. S., 123 Ga. 167, 51 S. E. 305; Stafford v. S., 154 Ala. 71, 45 So. 673; but compare as to dismissal of congregation, S. v. Leonard, 141 Mo. Ap. 116, 125 S. W. 234. As to disturbing a family re-union, S. v. Starnes, 151 N. C. 724, 66 S. E. 347.

5. S. v. Zimmerman, 53 Ind. 360. See Kidder v. S., 58 Ind. 68. See, contra, Blake v. S., 18 Ind. Ap. 280, 47 N. E. 942.

§ 286 a. **The Particular Vill or Parish**—need not be stated in either the averment or proof of the place.[6]

§ 287. 1. **The Manner of the Disturbance**—must be proved as laid,[7] yet doubtless so only as to the substance of the issue.[8] If the allegation of it is surplusage, it need not be proved.[9] To illustrate,—

2. **Variance**—A charge that the defendant went drunk into a religious assembly, and there talked in a loud voice, and the like, is not sustained by proof of striking the building on the outside with a stick, to the disturbance of the worshippers within. "The State," said Nash, C. J., "did not rest its charge against the defendant by averring that by loud and unusual noises, he had disquieted the congregation; in which case any such noises, however made, with a view to such disturbance, and attended with that effect, would have sustained the indictment; but it has particularized *when* the acts were done, and *what* they were."[10]

§ 287 a. 1. **The Witnesses**—should state the acts of disturbance, but not their opinion that they amounted to such.[11]

2. **The Evidence**—should show either a participation of the defendants in the disturbance, or connect them with those who did the acts.[12]

6. Corley v. S., 3 Tex. Ap. 412; Bush v. S., 5 Tex. Ap. 64; Warren v. S., 3 Heisk. 269; Kindred v. S., 33 Tex. 67. See ante, §§ 111, 135 (1); Stratton v. S., 13 Ark. 688; S. v. McClure, 13 Tex. 23.

7. Stratton v. S., 13 Ark. 688; Lyons v. S., 25 Tex. Ap. 403. Under Georgia statute talking or whispering is a disturbing and brings the offender under the statute though but one person is disturbed. Nichols v. S., 103 Ga. 61, 29 S. E. 431. This is the rule in Texas. Wyatt v. S., 56 Tex. Cr. 50, 119 S. W. 1147.

8. Ante, § 281 (2).

9. Hull v. S., 120 Ind. 153.

10. S. v. Sherrill, 1 Jones (N. C.) 508, 509.

11. Morris v. S., 84 Ala. 457, 4 So. 628; Calvert v. S., 14 Tex. Ap. 154. See, Stafford v. S., 154 Ala. 71, 45 So. 673.

12. Miller v. S., 83 Ind. 334; Jackson v. S., 87 Ga. 432, 13 S. E. 689. And see S. v. Bledsoe, 47 Ark. 233, 1 S. W. 149; S. v. Jacobs, 103 N. C. 397, 9 S. E. 404; Denny v. S., 52 Tex. 158, 105 S. W. 798. The conduct and declarations of accused during the whole time of worship are competent to show wilfulness. Adair v. S., 134 Ala. 183,

§ 288. **Others disturbing.**—Whether the indictment is on the common law or a statute, it will not avail the defendant, nor will he be permitted to show, that others had committed similar disturbances and no objection was made.[13]

II. *Statutory Disturbances.*

§ 289. 1. **In England,**—when the disturbance is to a congregation of worshipping dissenters, whose chapel to be lawful must be registered, averments may be necessary which are not so in this country.[14] As to those which should be the same in both countries,—

2. **Indictment.**—Archbold's form sets out the special facts of the disturbance, in addition to covering the statutory terms, and there is probably no late English authority for omitting them.[15]

§ 290. 1. **For American Use,**—a considerable variety of forms is given in "Directions and Forms."[16] Though there are diversities of opinion with us, on the whole our indictment is substantially the same as the modern English, just stated. For example, where a statute made it punishable to "interrupt a congregation assembled for the purpose of worshipping the Deity," an indictment, held good upon it, charged that on, etc., at, etc., the defendant "did unlawfully, contemptuously, and of purpose interrupt a congregation of Methodists, then and there assembled for the purpose of worshipping the Deity, by then and there talking and swearing with a loud voice."[17] It is perceived that

32 So. 326. Wilfulness implies the disturbance was intentional. S. v. Dahlstrom, 90 Minn. 72, 95 N. W. 580, holding that a request in a religious meeting by defendant to be permitted to defend himself from accusations then and there made against him, is not disturbing a meeting wilfully.

13. Harrison v. S., 37 Ala. 154.

14. New Crim. Law, I, § 542.

15. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 667 (19th Ed.) 998. He refers to Rex v. Cheere, 4 B. & C. 902, 7 D. & R. 161, as to which see ante, § 285 (3), note; S. v. Starnes, 151 N. C. 724, 66 S. E. 347.

16. Dir. & F., §§ 363-372.

17. Cockreham v. S., 7 Humph. 11. And see, as not essentially differing from this. S. v. Stubblefield, 32 Mo. 563; Kidder v. S., 58 Ind. 68; S. v. Ringer, 6 Blackf. 109; Lockett v. S., 40 Tex. 4; Hicks v.

the character of the disturbance is set out, but not necessarily the precise words and specific acts.[18] Beyond this, the indictment should sufficiently conform to the statutory terms;[19] as,—

2. "**Unlawfully.**"—If a disturbing of the meeting "unlawfully" is prohibited, it will be inadequate to charge it as "wilfully."[20]

3. "**At or Near.**"—Where the thing prohibited was a disturbance "at or near the place of worship," the words "at or near" were at first adjudged necessary to be averred.[21] But on subsequent consideration the court overruled this decision; because, said Deaderick, J., the "precise locality of the offender . . . is not an essential element of the offense."[22] This accords with the general doctrine that the law holds an offense to be committed in the locality where the criminal act takes effect and it is immaterial whether the personal presence of the accused is there or elsewhere.[23]

§ 291. *Some Particular Questions on the Statutes:—*

Disturbing School.—A statute made punishable "every person who shall at any time wilfully interrupt or disturb any district school, or any public, private, or select school, while the same is in session." And it was adjudged insufficient to charge that the defendant wilfully disturbed a school met for culture in church music, because omitting to

S., 60 Ga. 464; P. v. Crowley, 23 Hun 412; Riggs v. S., 7 Lea, 475; Howard v. S., 87 Ind. 68.

18. S. v. Ratliff, 5 Eng. 530. And see cases in last note to ante, § 285 (3).

19. S. v. Kindrick, 21 Mo. Ap. 507; S. v. Cate, 58 N. H. 240; Cooper v. S., 75 Ind. 62; Smith v. S., 63 Ala. 55.

20. S. v. Townsell, 3 Heisk. 6. "Wilfully must be used. S. v. Stroud, 99 Iowa, 16, 68 N. W. 450, and proved. Com v. Prather, 1 Gray (Mass.) 476. See post, § 296.

21. S. v. Doty, 5 Coldw. 33. As to evidence which will sustain allegation of disturbing meeting "at" a place. See, Minter v. S., 104 Ga. 743, 30 S. E. 989; McCright v. S., 110 Ga. 261, 34 S. E. 110, and also, Freeman v. S. (Tex. 1898), 44 S. W. 170.

22. Warren v. S., 3 Heisk. 269, 271.

23. Vol. I, § 53.

cover the last clause of the statute by saying that the school was in session.[24]

§ 292. **Evidence of Intent.**—Under the provision that one who sells bread or other named thing within a mile of any worshipping assembly, so as to interrupt it, shall be dealt with as a rioter, his illegal intent may be inferred from his doing and persisting in the forbidden acts, to the creating and continuing of the disturbance. "As men seldom do unlawful acts with innocent intentions," said the learned judge, "the law presumes every act in itself unlawful to have been criminally intended."[25]

§ 293. 1. **Society or Members.**—Where the forbidden disturbance is of "any religious society *or* any members thereof,"[26] both clauses may be proceeded upon in one count.[27] The allegation may be that the defendant, "being present at and when a certain religious society was convened and met together for the worship of Almighty God did then and there interrupt, molest, and disturb said society and meeting, and the individual members thereof, by then and there in a loud, insulting, and boisterous manner talking," etc.[28] And—

2. **The Name of the Society,**—it was also held, need not be averred; for it was not essential, observed Sullivan, J., "to the existence of a society convened for public worship that it should be known by any distinctive or sectarian name."[29]

§ 294. **Whether the Means of Disturbance**—must, by general doctrine, be set out we have already considered.[30]

24. S. v. Gager, 28 Conn. 232. See, also, S. v. Davis, 126 N. C. 1059, 35 S. E. 600.

25. West v. S., 9 Humph. 66, 70. Statutes of this sort are aimed against persons who seek to prevent religious worship by the unlawful means specified, and are not intended to settle the respective rights of parties to carry on worship at a particular time and place. Woodall v. S., 4 Ga. Ap. 783, 62 S. E. 485; and compare as to what conduct in asserting ones right may be a disturbance of worship. Coleman v. S., 4 Ga. Ap. 786, 62 S. E. 567.

26. New Crim. Law, II, § 305.

27. Vol. I, §§ 434, 436.

28. S. v. Ringer, 6 Blackf. 109.

29. Ib.

30. Ante, §§ 285, 289, 290.

While possibly there may be some at the present day who deny its general necessity,[31] there are statutes which so far specify the means as to render some averment of them plainly indispensable to a covering of the statutory terms.[32]

§ 295. **Duplicity of Means.**—Since an offense which may be committed in different ways is only one offense,[33] a count is not double which charges that the disturbance was by "profanely swearing," "and by talking and laughing aloud." In the case holding this, it was said that the latter clause was not in the statute, therefore the allegation was mere surplusage.[34] But if it had been in the statute, it would not have been surplusage, yet the indictment would still have been good.

§ 296. **Following Statutory Words.**[35]—Where "wilfully, or maliciously, or contemptuously" are statutory words, they must be in the indictment.[36] And "*congration*" in the indictment, instead of the statutory "congregation," is insufficient.[37] But it need only follow accurately and fully the words of the statute.[38]

§ 297. **Assault laid as Disturbance.**—A charge of assault on one named, so near, etc., as to disturb, etc., is not good for assault alone; because it merely describes the assault as the means for effecting the disturbance.[39]

§ 298. **"House for Worship"—"Meeting-house"—"Assembled," etc.**—The word "meeting-house," in a statute, is sufficiently supplied by "house for religious worship" in the indictment. And the allegation that the people were "assembled for religious worship" is equivalent to saying

31. C. v. Daniels, 2 Va. Cas. 402. See New Crim. Law, II, § 303.

32. S. v. Schieneman, 64 Mo. 386; S. v. Minyard, 7 Eng. 156; Fletcher v. S., 7 Eng. 169.

33. Ante, § 293 and the places there referred to.

34. S. v. Horn, 19 Ark. 578.

35. See ante, § 290.

36. S. v. Bankhead, 25 Mo. 558; S. v. Hopper, 27 Mo. 599; S. v. Stroud, 99 Iowa, 16, 68 N. W. 450. "Wilful means with evil intent, without reasonable grounds for believing the act to be lawful. Holmes v. S., 39 Tex. Cr. 231, 45 S. W. 487, 73 Am. St. 921.

37. S. v. Mitchell, 25 Mo. 420.

38. S. v. Stubblefield, 32 Mo. 563.

39. S. v. Bankhead, 25 Mo. 558.

they were attending a "protracted or other religious meeting."[40]

§ 299. **Town Meeting—Persistent Disturbance.**—Under the Massachusetts statute of 1785, to punish disorderly conduct in town meetings, the indictment was required to charge the defendant with having presisted in his disorder after notice from the moderator; and with refusal or neglect to withdraw, after being directed to, as provided by the statute.[41]

§ 300. **Summary Conviction—Writ of Error.**—In Pennsylvania, the judgment of the Court of Common Pleas, on *certiorari* to a justice of the peace, upon a summary conviction under the act of 1847, for disturbing a religious meeting, may be reviewed by the Supreme Court on writ of error.[42]

§ 301. **In General, the Procedure for this Offense**—is, neither under the common law nor under our American statutes, so settled by multiplied adjudications as to render impertinent any intelligent appeal to principle. And the teachings of principle, it is believed, are sufficiently explained in the foregoing sections.

40. S. v. Yarborough, 19 Tex. 161. As to being intoxicated in church. Harrell v. S., 9 Ga. 624, 71 S. E. 1030. "Indecently" acting embraces all improper conduct which disturbs. Folds v. S., 123 Ga. 167, 51 S. E. 305.

41. C. v. Hoxey, 16 Mass. 385.

42. C. v. Burkhart, 23 Pa. 521.

For Dogs, Unlicensed Keeping of, see Dir. & F., § 177; Domestic Animals, Offenses Concerning, see Stat. Crimes, also Dir. & F., §§ 163-177; Double Offenses, see Dir. & F., § 91 et seq. and places there referred to; Double Voting, see Election Offenses in Stat. Crimes, and Dir. & F., §§ 382-400; Drunkenness, as an offense, see Stat. Crimes; Dir. & F., § 373-376. As an excuse for crimes, see New Crim. Law.

CHAPTER CXIII.

DUELLING.

Consult—for the law of this offense, New. Crim. Law, II, §§ 311-317. For the indictment, etc., Dir. & F., §§ 377-381. And for various incidental questions, see the indexes to this series of books.

§ 302. **Resulting in Death.**—There may be a few States in which a killing in a duel is by statute an offense distinct from murder.[43] But under our American statutes generally and at the common law it is not,[44] consequently the procedure for such killing belongs to the title Homicide. Thus,—

§ 303. **Charge of Fighting—(Connected Offenses).**—The Virginia court deemed the fighting of a duel not a separate offense; hence the simple allegation that the defendant "did fight a duel with pistols" was held ill on demurrer. Yet growing out of a duel there might be an indictable breach of the peace, as affray or assault; or, if death ensued, it would be murder.[45]

§ 304. 1. **Challenging to a Duel**—is a species of solicitation to commit a crime,[46] so that—

2. **The Indictment for Challenging**—is constructed in the manner explained for solicitation under the title At-

43. P. v. Bartlett, 14 Cal. 651.

44. New Crim. Law, II, § 311; Bundrick v. S., 125 Ga. 753, 54 S. E. 683; Dorsay v. S., 110 Ga. 331, 35 S. E. 651, 4 Bl. Com. 100, 145; 2 Bush. Cr. L., §§ 311-315; 1 Russ. Cr. (9th Edition) 413; 3 Chitty Cr. Law 728, 848.

45. C. v. Lambert, 9 Leigh, 603; New Crim. Law, II, §§ 311, 312; Rex v. Rice, 3 East, 581; Reg. v. Young, 8 Car. & P. 644.

46. Rex v. Rice, 3 East, 581. Challenging to fight with fists and hands is not challenging to fight a duel within a statute. S. v. Fritz, 133 N. C. 725, 45 S. E. 957; but the parties thus fighting may be convicted of an affray. At common law an agreement to fight a duel was sometimes regarded as equivalent to a breach of the peace. Com. v. Lambert, 9 Leigh (Va.) 603, 3 Coke Inst. 158; Rex v. Rice, 3 East, 581.

tempt.[47] Archbold has a count drawn on the common law, doubtless adequate, which simply avers that on, etc., at, etc., the defendant ("contriving," etc., an introduction plainly needless[48]) "wickedly, wilfully, and maliciously did provoke, instigate, excite, and challenge" a person named "to fight a duel with and against him the said" defendant.[49] The books contain forms more elaborate,[50] but in a simple and ordinary case no just reason appears for preferring them to this.[51]

§ 305. 1. **Setting out Challenge.**—Though the challenge is in writing,—as, where it is by letter,—the words need not be set out.[52] It is sometimes done, and to this there is no legal objection.[53] Plainly, therefore, where it is verbal,[54] its particular words are not required to be given. And—

2. **That the Parties understood**—the written challenge to be such need not be averred.[55]

§ 306. 1. **Place of Combat—Averring Challenge.**—Under the statutory words "give, accept, or knowingly carry a challenge in writing or otherwise to fight in single com-

47. Ante, §§ 74-76.

48. Yet see the observations of Lord Ellenborough, C. J. in Rex v. Philipps, 6 East, 464, 470.

49. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 604, 19th Ed. 911. And see Rex v. Philipps, 6 East, 464; C. v. Hart, 6 J. J. Mar. 119. Campare this with ante, § 74. And for another form see S. v. Farrier, 1 Hawks, 487.

50. 3 Chit. Crim. Law, 849; 6 Went. Pl. 461.

51. Yet see the form in Dir. & F., § 378. If a challenge to fight is a statutory crime, it may not be necessary to follow the words of the statute though it be necessary that a crime as defined by the statute should be charged. S. v. Gibbons, 4 N. J. L. 40; Ivey v. S., 12 Ala. 276.

52. Brown v. C., 2 Va. Cas. 516; S. v. Farrier, 1 Hawks, 487. As to Kentucky, see Heffren v. C., 4 Met. (Ky.) 5.

53. 3 Chit. Crim. Law, 849; Moody v. C., 4 Met. (Ky.) 1; C. v. Pope, 3 Dana, 418.

54. S. v. Strickland, 2 Nott & McC. 181; S. v. Perkins, 6 Blackf. 20.

55. Moody v. C., 4 Met. (Ky.) 1; Heffren v. C., 4 Met. (Ky.) 5. And see C. v. Rowan, 3 Dana, 395. The form of the challenge is not material. It may be oral or written, or it may consist of words or writings and also of acts. S. v. Perkins, 6 Blackf. (Ind.) 20; S. v. Strickland, 6 J. J. Marsh (Ky.) 119.

bat, with any deadly weapon, either in or out of the State," the place of combat is immaterial and need not be alleged.[56] And the averment that the defendant gave the prosecutor a challenge to fight in single combat was held equivalent to saying that he challenged him to fight.[57]

2. **"In the State"—(Residence).**—"Any person, resident in or being a citizen of this State" was by statute prohibited to "send, give, or accept a challenge to fight a duel within this State." Still the inhibition was held to extend to all persons, residents, citizens or not, who "shall within this State, send, or give, or accept a challenge to fight a duel." And the indictment for carrying a challenge was held not to require the averment that the person challenging is "a citizen or resident of this State."[58]

§ 307. **Venue.**—Though the duel is to be fought out of the State, the county of the challenge in it must be averred and proved.[59] So also must be the county even on a charge of leaving the State to fight a duel.[60] "Where the letter containing the challenge was put into the post-office in the county of Middlesex, to be delivered to the prosecutor in another county, Lord Ellenborough held that the party might be indicted in Middlesex; for *sending* the challenge is the offense, whether it reach the person to whom it is sent or not is immaterial."[61]

§ 308. 1. **Declarations of Seconds.**—When the wrongful combination about the duel has been shown,[62] the de-

56. Ivey v. S., 12 Ala. 276. And see Harris v. S., 58 Ga. 332.

57. Ivey v. S., supra.

58. S. v. Cunningham, 2 Speers, 246. And see Moody v. C., 4 Met. (Ky.) 1.

59. C. v. Boott, Thacher Crim. Cas. 390, 394, 399, 400. See Heard v. Faris, 1 Litt. 245; Gordon v. S., 4 Mo. 375.

60. S. v. Warren, 14 Tex. 406. The state may introduce an alleged written challenge in evidence, but is not compelled to do so for there is no presumption that it has the challenge in its possession. The conduct and declarations of the defendant accompanying or explaining the writing are also received. Com. v. Hart, 6 J. J. Marsh (Ky.) 119.

61. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 604, referring to Rex v. Williams, 2 Camp. 506.

62. Vol. II, § 1248 (2); ante, §§ 228-230.

clarations of the seconds are admissible against one another and their principals.[63] So are those of the principals against the seconds.[64] Moreover,—

2. **Seconds as Witnesses.**—The seconds may be witnesses against their principals; but unless they accept the position of approvers or accomplices,[65] they are not compellable to testify.[66]

§ 309. **What for Jury—Explaining Note of Challenge.**—It is for the jury to decide whether or not there was a challenge.[67] To aid them in this, the note sent from the one party to the other, and parol testimony in explanation, may be produced.[68]

§ 310. **To Provoke or Entice One to Challenge**—another to a duel is indictable at the common law.[69] Archbold's form for it sets out the words;[70] but evidently, within principles already explained in this chapter, they are not necessary. He says: "Add a general count, not setting out the words, but merely charging the defendant with having used threats and opprobrious language to the prosecutor with intent, etc."

§ 311. **For Carrying a Challenge**—to a duel, the indictment should aver a *scienter*, and it should be proved.[71]

63. S. v. Dupont, 2 McCord, 334; S. v. Taylor, 3 Brev. (S. C.) 243; Moody v. C., 4 Met. (Ky.) 1.

64. C. v. Boott, Thacher Crim. Cas. 390.

65. Vol. II, §§ 1156-1172.

66. Rex v. England, 2 Leach, 767, Car. Crim. Law (3d Ed.) 232; Cullen v. Com., 24 Gratt. (Va.) 624, 625.

67. S. v. Strickland, 2 Nott & McC. 181; Ivey v. S., 12 Ala. 276; Ward v. Com., 132 Ky. 636, 116 S. W. 786. So whether a fight with pistols was a pre-arranged duel is for the jury. S. v. Herriott, 1 McMullen (S. C.) 126.

68. C. v. Hart, 6 J. J. Mar. 119; S. v. Taylor, 3 Brev. 243; C. v. Pope, 3 Dana, 418; Herriott v. S., 1 McMul. 126. And see C. v. Hooper, Thacher Crim. Cas. 400.

69. Rex v. Philipps, 6 East, 464.

70. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 605. And see the form in Dir. & F., § 380.

71. U. S. v. Shackelford, 3 Cranch C. C. 178.

CHAPTER CXIV.

EAVESDROPPING.

Consult—for the law of this offense, New Crim. Law, I, §§ 1122-1124; for the indictment, etc., Dir. & F., §§ 796, 797. And see, for various questions, the indexes to this series of books. Consult also the title NUISANCE.

§ 312. **Form of Indictment.**—The modern books of precedents appear not to contain any form of the indictment for this nearly antiquated offence. It belongs to the class known as nuisances, consequently the indictment should be constructed after the general manner of this class. The following is suggested:—

That A, late of, etc., at, etc., on, etc., and on each and every day thence continually until the day of the finding of this indictment,[72] was and is a common eavesdropper, and there continually and on each and all of said days and times did listen about the house and under the windows and eaves of the houses of the people there dwelling, hearing tattle, and repeating it in the hearing of all persons, to the common nuisance, etc., and against the peace, etc.

§ 313. **Evidence.**—It may be desirable, and perhaps it is legally necessary,[73] to prove, at least, three instances of offending; from which, and from the more general evidence, the jury will infer the habit of eavesdropping, wherein probably is the gist of the offense.[74]

72. Vol. I, § 395; ante, § 103 (1).

73. New Crim. Law, I, § 1102 (2); II, § 65.

74. In S. v. Pennington, 3 Head, 299, 75 Am. D. 771, sustaining, in matter and form, an indictment for stealthily approaching a grand-jury room and hearing what was done therein (New Crim Law, I, § 1123), the idea of repetitions of the act, amounting to a common nuisance was evidently not in the mind of the court. But the species of the offense then under consideration, assuming it to be rightly called eavesdropping, still consisted in a sort of obstruction of public justice; and there, perhaps, repetitions may not be necessary to the nuisance,—just as a single obstruction of a public way may be indictable, though it does not continue long. See the form in this case; somewhat changed in Dir. & F., § 797.

For Election Offenses, see Stat. Crimes; and Dir. & F., §§ 382-400. And consult the indexes to this series of books.

CHAPTER CXV.

EMBEZZLEMENT.

Consult—for the law of this offense, New Crim. Law, II, §§ 318-383. For the forms, Dir. & F., §§ 401-412. And for collateral things, see the indexes to this series of books. See also the title LARCENY.

§ 314. 1. **The Varying Terms of Statutes**—and the differing statutory regulations of the procedure, not uniform in the States, and not always continuous in the same State, render the comprehension of this subject difficult. Hence,—

2. **The Practitioner**—can accept what is said in this chapter only as a help, not absolutely as a guide; for if he would proceed safely, he must also consult carefully the statutes of his own States, and the decisions of his own courts thereon.

3. **How Chapter divided.**—We shall consider the subject, I. In General; II. In Particular Cases.

I. *In General.*

§ 315. **The Indictment**—charges, besides its formal parts,—

1. That the defendant stood in some fiduciary relation to another person named, within the terms of the statute; as, that he was the other's "servant," or "clerk," or "treasurer."

2. That by virtue of such relation, he received some specified thing of value for and on behalf of his master or employer, of a sort made by the statute a subject of embezzlement.

3. That he did embezzle it, or some specified portion thereof.

4. Under a part, not all, of the statutes, that he did steal, etc., the same, proceeding with the formalities of a count for larceny. We shall see that in principle this allegation is needless; but the practice is to insert it, and it seems to be required by the decisions.[74a]

5. All this, and anything else which the particular statute renders material, must be stated with a fulness and in a manner to cover the statutory terms, and apprise the defendant of what he is to answer to, conformably to the rules which govern indictments both at the common law and upon statutes.[75]

Not proposing to follow the order of the averments, we shall more particularly consider them as to—

§ 316. Charging simply as Larceny.—Where the statute, like the parent one of 39 Geo. 3,[76] provides that whoever embezzles a thing "shall be deemed to have feloniously stolen the same," it would appear to accord with the Virginia doctrine [77] to accept as adequate an indictment simply in the common law form for the larceny thereof. But the English courts, and generally the American, deny this, and require the indictment to set out the statutory elements of the offense.[78] And—

74a. Indictment charging embezzlement where there is no statutory crime by that name is fatally defective. In re Richter, 100 F. 295.

75. See forms in Dir. & F., §§ 401-412; 6 Chit. Crim. Law, 962 et seq.; Archb. Crim. Pl. & Ev. (19th Ed.) 482; Rex v. Johnson, 3 Met. & S. 539, 2 Leach, 1103; U. S. v. Clark, Crabbe, 584; C. v. Hussey, 111 Mass. 432; P. v. Doss, 39 Cal. 428; S. v. Hebel, 72 Ind. 361; C. v. Pratt, 137 Mass. 98; S. v. McKinney, 130 Ia. 370, 106 N. W. 931; Hylton v. Com., 29 Ky. L. 64, 91 S. W. 696; S. v. Phillips, 36 Mont. 112, 92 P. 299; Farmer v. Com., 28 Ky. L. 1369, 91 S. W. 1129; S. v. Abbott, 5 Penn. (Del.) 330; 63 A. 231; S. v. Whitehouse, 95 Me. 179, 49 A. 869; S. v. Cates, 99 Me. 68, 69, 58 A. 238; S. v. Rue, 72 Minn. 296, 75 N. W. 235; S. v. Nelson, 79 Minn. 373, 82 N. W. 674; S. v. Whitworth, 30 Wash. 47, 70 P. 254; S. v. Raby, 31 Wash. 111, 71 P. 771.

76. New Crim. Law, II, § 321.

77. Ante, § 185 (1).

78. Stat. Crimes, §§ 416, 418, 421, 422; Kibs v. P., 81 Ill. 599; C. v. Kirby, 9 Cush. 284; C. v. Simpson, 9 Met. 138; Rex v. Johnson, 3 M. & S. 539; Rex v. Crighton, Russ. & Ry. 62; C. v. Pratt, 132 Mass. 246.

§ 317. In Principle—it should be so; because the statute makes punishable a specified act when performed under circumstances it points out, and only on an allegation both of the circumstances and of the act can its criminality be made to appear. The common law form for larceny avers neither the circumstances of an embezzlement nor the act. Hence it is wholly inadequate.[79] But—

§ 318. Concluding as for Larceny.—The statutory provision that the defendant shall be deemed guilty of larceny is merely a conclusion of law; and alike in reason and on the rules of criminal pleading accepted in other cases,[80] no notice of it need be taken in the indictment. The judges know the law;[81] and equally well might they require the indictment to inform them of the punishment, or of the terms of the statute whereon it is drawn, or of their duty to defer sentence till the prisoner is convicted, as, after averring all the facts which the statute makes elements in the new larceny, to tell them it is larceny, or repeat against him the charge of larceny in another form. On setting out of the facts of one offense is enough.[82] But evidently by a blunder, the cases generally hold or assume, and so do the books of precedents, that the indictment must aver this conclusion of law, and charge twice over the larceny, once according to the real facts, and again contrary to them. Yet the author is not able to refer to any case wherein this has been distinctly adjudged on any intelligent consideration of the principles.[83] Resulting from this blunder, or as a part of it,—

79. And see observations by Dewey, J. in C. v. Simpson, 9 Met. 138, 142.

80. Vol. I, § 329; Vol. II, §§ 509, 514, 515. Larceny need not be charged. S. v. Whitehouse, 95 Me. 179, 49 A. 869; S. v. Cates, 99 Me. 68, 58 A. 238; S. v. Browning, 47 Ore. 470, 82 P. 955.

81. New Crim. Law, I, §§ 294-300, 311, 312.

82. And see Stat. Crimes, §§ 420-422; S. v. Sweet, 2 Ore. 127.

83. Rex v. McGregor, 3 B. & P. 106, 2 Leach, 932; Rex v. Johnson, 3 M. & S. 539; Rex v. Crighton, Russ. & Ry. 62. Yet C. v. Pratt, 132 Mass. 246, which holds this conclusion to be necessary, seems to have been pretty fully, if not satisfactorily, considered; at the same time, the

§ 319. 1. **Contrary to Reason.**—The pleader, in setting out one offense, was by the adjudications compelled to follow the conflicting rules governing the allegations for each and both of two differing offenses. Thus,—

2. **To illustrate.**—In common law larceny the thief takes by trespass an article of personal property out of the possession of its owner. The latter knows what it is, he has handled it, and can describe it, therefore he must describe it. But since the theft was a secret wrong and the prosecutor does not know how it was committed, the pleader need not allege the method. On the other hand, in statutory embezzlement, the thing embezzled has not ordinarily been handled by the master; so he cannot state what it is with such minuteness as though it had been stolen, and the law should not compel him to. He should be permitted simply to mention the thing in a general way. But as he can set out particularly the relations between himself and the servant, he should be required to do this, so far as it materially affects the offense, or is desirable for its identification. And the like rule should be applied to the other circumstances within the probable knowledge of the prosecutor.[84] But while the blunder was rightly not permitted to relieve the pleader from alleging anything which the law of embezzlement thus properly required, it wrongly subjected him to the duty also of setting out, in addition what the common law of larceny demanded, contrary to reason. And this uncalled-for strictness gave facilities for the needless escape of offenders through the meshes of pleading, till legislation interposed.[85]

§ 320. 1. **The Description of the Thing Embezzled**—was therefore, in the absence of legislative interposition,

real objection to this conclusion appears to have escaped the notice of the judges, certainly there is no attempt to answer it. See also S. v. Lanier, 89 N. C. 517; S. v. Fain, 106 N. C. 760, 11 S. E. 593; S. v. Fricker, 45 La. Ann. 646, 12 So. 755; S. v. Harmon, 106 Mo. 635, 18 S. W. 128; S. v. Butler, 26 Minn. 90.

84. See, in Vol. II, the chapter commencing § 493.

85. As to how it did in England, see post, 332 (1).

required by the courts to be the same as in an indictment for the larceny thereof. So it was under the parent statute of 39 Geo. 3, c. 85, and thence onward; "for the new offense created by the act of Parliament being a larceny, it must be described in the indictment as such, and with all the properties of a larceny."[86] And—

2. **The Ownership**—must be alleged, and with the same accuracy and after the same rules, as in common law larceny.[87]

3. **As to alleging Value,**—the case is in principle within explanations in the first volume.[88] Some reference to authorities appears in a note.[89]

§ 321. 1. **In what Part of the Indictment**—the description is given of the embezzled thing is immaterial. Thus, if it identifies bank-notes, then states that they were re-

86. Rex v. McGregor, 3 B. & P. 106, 109, 2 East P. C. 576; P. v. Cox, 40 Cal. 275, 277; S. v. Muston, 21 La. Ann. 442; C. v. Butterick, 100 Mass. 1, 97 Am. D. 65; S. v. Ward, 48 Ark. 36, 3 Am. St. 213, 2 S. W. 191; S. v. Thompson, 42 Ark. 517; Bork v. P., 16 Hun, 476; P. v. Brander, 244 Ill. 26, 91 N. E. 59; S. v. Mispagel, 207 Mo. 557, 106 S. W. 513; Webb v. York, 25 C. C. A. 133, 79 F. 616.

Books or Printed Sheets. If one delivers printed sheets to be bound, to another who embezzles them when he has folded, stitched, and bound them, the indictment should charge them, not as printed sheets, but as books. C. v. Merrifield, 4 Met. 468.

87. Ib.; Norton, 11 Allen, 110; P. v. Potter, 35 Cal. 110; Reg. v. Robinson (Law Rep.) 1 C. C. 80, 10 Cox C. C. 467; U. S. v. Okie, 5 Blatch. 516; Livingston v. S., 16 Tex. Ap. 652; S. v. Lyon, 16 Vroom, 272; Alden v. S., 18 Fla. 187; S. v. Roubles, 43 La. Ann. 200, 26 Am. St. 179, 9 So. 435; S. v. Knox, 17 Neb. 683, 24 N. W. 382. See S. v. Walton, 62 Me. 106; "belonging to" is enough, Whitney v. S., 53 Neb. 287, 73 N. W. 696.

88. Vol. II, §§ 540, 541, 567.

89. Cooksie v. S., 26 Tex. Ap. 72; Reside v. S., 10 Tex. Ap. 675; Gerard v. S., 10 Tex. Ap. 690; P. v. Donald, 48 Mich. 491, 12 N. W. 669; S. v. Mook, 40 Ohio St. 588; Willis v. S., 134 Ala. 429, 32 So. 309; Lewis v. S., 55 Fla. 54, 45 So. 998. A statement of an amount of money as embezzled, is a sufficient allegation of value. S. v. Barr, 61 N. J. L. 131, 38 A. 817; Mills v. S., 53 Neb. 263, 73 N. W. 761; S. v. Alversen, 105 Iowa, 152, 74 N. W. 770; Ter. v. Hale, 13 N. M. 181, 81 P. 583. Value of article need not be alleged, where the statute fixes the punishment irrespective of value. S. v. Small, 26 Kan. 209. See, also Com. v. Warner, 173 Mass. 541, 54 N. E. 353.

ceived for the prosecutor by the defendant his clerk, then embezzled by the latter, the conclusion may be that "so the defendant did feloniously steal, take, and carry away the bank notes," laying them as the prosecutor's.[90]

2. **Sums of Money.**—To say that the thing embezzled was "the sum of one pound eleven shillings" has been held inadequate; because "the indictment ought to set out specifically, at least some article of the property embezzled, and the evidence should support that statement."[91] So, "divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of £ 10," is sufficient.[92] And the allegation that it was a certain sum in "United States currency" is not good.[93] But—

3. **Statutes,**—in England and our States have, as above intimated, variously modified the rule requiring the description of the thing to be the same as in larceny. Upon them simply, and in conjunction with common law doctrines, various questions have arisen, not best, on account

90. Rex v. Johnson, 3 M. & S. 539. And see Rex v. Tyers, Russ. & Ry. 402; Reg. v. Parfitt, 8 Car. & P. 288. "Railroad ticket" is a sufficient description of property. Com. v. Parker, 165 Mass. 526, 43 N. E. 526. Date, amount, time of maturity and maker of a promissory note is sufficient. S. v. Rue, 72 Minn. 296, 75 N. W. 235; charging an instrument embezzled as a "check" without stating in whose favor or on what bank drawn is sufficient. S. v. Burks, 159 Mo. 658, 60 S. W. 1100.

91. Rex v. Furneaux, Russ. & Ry. 335. And see Noble v. S., 59 Ala. 73. Under the most recent cases the character and kind of money need not be alleged. It suffices to allege amount. Walker v. S., 117 Ala. 42, 23 So. 149; Cody v. S., 100 Ga. 105, 28 S. E. 106; Ter. v. Hale, 13 N. M. 181, 81 P. 583. See also statutes construed in S. v. Alverson, 165 Iowa, 152, 74 N. W. 770; S. v. Barr, 61 N. J. L. 131, 38 A. 817; S. v. Bartholomew, 69 N. J. L. 160, 54 A. 231; Dowdy v. S. (Tex. 1901), 64 S. W. 253; Butler v. S., 46 Tex. Cr. 287, 81 S. W. 743; Crawford v. S., 155 Ind. 692, 57 N. E. 931.

92. Rex. v. Flower, 5 B. & C. 736, 8 D. & R. 512. And see Bork v. P., 16 Hun, 476; S. v. Combs, 47 Kan. 136, 27 P. 818; Reside v. S., 10 Tex. Ap. 675; Gerard v. S., 10 Tex. Ap. 690; Gady v. S., 83 Ala. 51, 3 So. 429; Walker v. S., 117 Ala. 42, 23 So. 149.

93. Leftwich v. C., 20 Grat. 716. Allegation of specific not held good, U. S. v. Mason, 177 Fed. 552; Nelson v. S., 86 Neb. 856, 126 N. W. 518.

of their local and changing nature, to be here discussed.[94]

4. **Unknown.**—Aside from these statutes, something—it is not clear just how much—of the otherwise required particularity may be dispensed with by alleging, where it can be truly done, that the further description is to the grand jurors unknown.[95]

§ 322. **Did "embezzle."**—It is believed that the single statutory words, "did embezzle,[95a] sufficiently indicate the criminal act; just as "did burn" in arson,[96] "did make an assault" in assault,[97] "did solicit" in attempt,[98] did "break and enter" in burglary,[99] and "did conspire" in conspiracy,[1] are alone adequate, being the terms most accurately expressing the idea,[2] and requiring and admitting of no aid from circumlocution.[3] Generally the statute itself has one or more other like verbs connected disjunctively with "embezzle,"—for example, "shall fraudulently embezzle, secrete, or make away with," in 39 Geo. 3, c. 85,—and then commonly, for practical reasons, the pleader chooses to

94. Rex v. Grove, 1 Moody, 447, 7 Car. & P. 635; Reg. v. Sharp, 2 Cox C. C. 181; Reg. v. Balls (Law Rep.), 1 C. C. 328, 12 Cox C. C. 96; Block v. S., 44 Tex. 620; S. v. Smith, 13 Kan. 274; C. v. Concannon, 5 Allen, 502; P. v. De La Guerra, 31 Cal. 416; C. v. Hussey, 111 Mass. 432; C. v. Bennett, 118 Mass. 443; Brown v. S., 18 Ohio St. 496; U. S. v. Lancaster, 2 McLean, 431; Farnum v. U. S., 1 Colo. 309; U. S. v. Clark, Crabbe, 584; Lowenthal v. S., 32 Ala. 589; Mayo v. S., 30 Ala. 32, 33; S. v. Thompson, 32 La. Ann. 796; C. v. Wyman, 8 Met. 247; S. v. Carrick, 16 Nev. 120; S. v. Hays, 78 Mo. 600; Fleener v. S., 58 Ark. 98, 23 S. W. 1; Gady v. S., 83 Ala. 51, 3 So. 429; C. v. Leisenring, 11 Philad. 392; P. v. McMahill, 4 Cal. Ap. 225, 87 P. 404; S. v. Norkewicz, 3 Pen. (Del.) 299, 51 A. 601; S. v. Alverson, 105 Iowa, 152, 74 N. W. 770; Richburger v. S., 90 Miss. 806, 44 So. 772; Chamberlain v. S., 80 Neb. 812, 115 N. W. 555; S. v. Barr, 61 N. J. L. 131, 38 A. 817; S. v. Bartholomew, 69 N. J. L. 160, 54 A. 231.

95. Vol. II, §§ 493-495, 546-553; C. v. Hussey, supra; C. v. Sawtelle, 11 Cush. 142.

95a. Teston v. S., 50 Fla. 137, 39 So. 787; Mills v. S., 53 Neb. 263, 73 N. W. 761.

96. Ante, §§ 33, 46.

97. Ante, §§ 55, 56.

98. Ante, §§ 74, 88.

99. Ante, § 140.

1. Ante, § 205 (1).

2. Vol. II, § 514.

3. See the precedents referred to, ante, § 315; S. v. Wolff, 34 La. Ann. 1153; S. v. Combs, 47 Kan. 136, 27 P. 818.

connect conjunctively with "embezzle" one or more of the other verbs;[4] as, under this statute, he says, "embezzle and secrete,"[5] though "embezzle" alone would be equally well in law.

§ 323. 1. **Fraudulently**—If "embezzle" is either verbally or by construction[6] qualified in the statute by "fraudulently," or any other like word, the qualifying term should, of course, be also in the indictment.[7] And—

2. "**Feloniously.**"—Where, as in most of our States, the offense is felony,[8] the more prevalent opinion requires it to be charged as committed "feloniously," whether this word is in the statute or not.[9] But it was adjudged sufficient, under 39 Geo. 3, c. 85, to say in the conclusion that the prisoner "feloniously did steal, take," etc., though the earlier part of the indictment did not have "feloniously" before "embezzle."[10]

§ 323a. 1. **The Fiduciary Relation**—sustained by the defendant, and by the statute made an element of the offense, must be averred.[11] But the origin or particulars of the relation, or anything more than that the defendant was

4. Vol. I, §§ 434, 436.

5. 3 Chit. Crim. Law, 963; Rex v. Crighton, Russ. & Ry. 62; S. v. Palmer, 32 La. Ann. 565. And see Lowenthal v. S., 32 Ala. 589; C. v. Mead, 160 Mass. 319, 35 N. E. 1125. Compare P. v. O'Farrell, 247 Ill. 44, 93 N. E. 136; "fraudulently" need not be inserted. In re Grin, 112 F. 790 affirmed, Grin v. Shine, 187 U. S. 181, 23 S. Ct. 98, 47 L. Ed. 130.

6. Dir. & F., § 32.

7. Bridgers v. S., 8 Tex. Ap. 145; Evans v. U. S., 153 U. S. 584; S. v. Lyon, 16 Vroom, 272.

8. As to which see New Crim. Law, II, § 380.

9. Vol. II, §§ 534-536. See P. v. Garcia, 25 Cal. 531.

10. Rex v. Crighton, Russ. & Ry. 62.

11. P. v. Tryon, 4 Mich. 665; P. v. Allen, 5 Denio, 76; Reg. v. Foulks (Law Rep.), 2 C. C. 150; Gravatt v. S., 25 Ohio St. 162; S. v. Newton, 26 Ohio St. 265; Reg. v. Bayley, Dears. & B. 121; s. c. nom. Reg. v. Bailey, 7 Cox C. C. 179; S. v. Roubles, 43 La. Ann. 200, 26 Am. St. 179, 9 So. 435; S. v. Washington, 41 La. Ann. 778, 6 So. 633; Fleener v. S., 58 Ark. 98, 23 S. W. 1; Com. v. Barney, 115 Ky. 475, 74 S. W. 181; S. v. Stevenson, 91 Me. 107, 39 A. 471; Bode v. S., 80 Neb. 74, 113 N. W. 996; Sias v. Ter., 11 Ariz. 175, 89 P. 539. Embezzlement by person employed by a corporation, Hayes v. S., 114 Ga. 25, 40 S. E. 13.

the injured party's "agent," or the like, in that wherein he acted, is unnecessary.[12] And in the proof, it suffices, for example, to show that the defendant was merely *de facto* the officer he is alleged to be.[13] Again,—

2. **Received through such Relation—From whom.**—Under statutes like 39 Geo. 3, c. 85, it is added in the averment that by virtue of such relation and employment, he received into his possession the thing which he is accused of embezzling.[14] In reason, where, as in England,[15] whether by construction of the statute or by its terms, the thing to be the subject of embezzlement must come to the servant from a third person and not from his master, the indictment should state from whom it was received, or say it was not from the master;[16] still, in practice, the forms do not include this, and it appears not to be deemed necessary.[17]

12. S. v. Poland, 33 La. Ann. 1161; S. v. Nicholson, 67 Md. 1, 8 A. 817; P. v. Hill, 3 Utah, 334, 3 P. 75; Terry v. S., 1 Wash. 277; S. v. Mohr, 63 Mo. 303; S. v. Goss, 69 Me. 22; S. v. Meyers, 68 Mo. 266; Ritter v. S., 111 Ind. 324, 12 N. E. 501; "Agent" Wynegar v. S., 157 Ind. 577, 62 N. E. 38; "bailee" P. v. Goodrich, 142 Cal. 216, 75 P. 796; Cody v. S., 100 Ga. 105, 28 S. E. 106; that accused was "intrusted with ' money' for use and benefit" of prosecutor, Keys v. S., 112 Ga. 392, 37 S. E. 762, 81 Am. St. 63; S. v. Steers, 12 Idaho, 174, 85 P. 104; S. v. Fellows, 98 Minn. 179, 108 N. W. 825; "received as clerk," S. v. Lipscomb, 160 Mo. 125, 60 S. W. 1081; S. v. Wise, 186 Mo. 42, 84 S. W. 954.

13. S. v. Findley, 101 Mo. 217, 14 S. W. 185; C. v. Logue, 160 Mass. 551, 553, 36 N. E. 475. And see P. v. Treadwell, 69 Cal. 226, 10 P. 502.

14. New Crim. Law, II, § 360; 3 Chit. Crim. Law, 962, 963; Reg. v. Bayley, supra.

15. New Crim. Law, II, § 365. Under some statutes the indictment need not allege a demand. Com. v. Fisher, 113 Ky. 491, 24 Ky. L. 300, 68 S. W. 855; Bartley v. S., 53 Neb. 310, 73 N. W. 744; Reynolds v. S., 65 N. J. L. 424, 47 A. 644; Dean v. S., 147 Ind. 215, 46 N. E. 528. If demand is necessary, indictment must allege by whom made. S. v. McKinney, 130 Iowa, 370, 106 N. W. 931.

16. And see Alden v. S., 18 Fla. 187; S. v. Roubles, 43 La. Ann. 200, 26 Am. St. 179, 9 So. 435; Washington v. S., 72 Ala. 272.

17. Reg. v. Bayley, supra; Rex v. Beacall, 1 Car. & P. 310; Rex v. Wellings, 1 Car. & P. 454. At the place last cited, Park, J. said to the prisoner: "As the indictments follow the words of the statute, and state that the money was received by you for your employers, and by virtue of your employments, the judges are unanimously of opinion that that is sufficient, without saying from whom the money was re-

There are statutes under which it must be averred that the thing did come from the master.[18]

§ 324. **Variance.**—A charge of embezzling "certain bills, commonly called Exchequer bills," was not sustained on its appearing that the person who signed them for the government was not authorized; for they were not the things averred.[19] So an indictment for the embezzlement of printed sheets is not proved by that of bound books.[20] Nor is an agreement to transmit a check satisfied by a check on a bank wherein the drawer has no funds, and which the bank declines to pay.[21]

§ 325. 1. **Joinder.**—Counts for larceny may be joined with those for embezzlement.[22] And—

2. **Election.**—If in fact one offense only is meant, the prosecutor will not be compelled to elect on which counts to proceed.[23]

§ 326. **The County,**—in which to bring the indictment,

ceived." This decision may, therefore, have proceeded on the idea that what was alleged amounted to a negation of the money having come to the servant from his master. If so, the principle is not antagonistic to what is maintained in the text.

18. P. v. Bailey, 23 Cal. 577.

19. Rex v. Aslett, 2 Leach, 954; 1 New Rep. 1, Russ. & Ry. 67; Rex v. Johnson, 2 Leach, 1103, 1105. The kind of money, if alleged, must be exactly proved. Knight v. S., 147 Ala. 104, 109, 41 So. 911; S. v. Norkewicz, 3 Penn. (Del.) 299, 51 A. 601. Embezzlement of "money" not proved by agent assigning an order to pay debt of agent. S. v. Hanly, 70 Conn. 265, 39 A. 148. See also, S. v. Schilb. A material variance in the ownership of the property converted is fatal. Ranguth v. P., 186 Ill. 93, 57 N. E. 832. See as to difference between embezzlement of personal property and of the proceeds thereof. S. v. Crosswhite, 130 Mo. 358, 32 S. W. 991, 51 Am. St. 571. As to description of kind of money and variance. Zartley v. S., 55 Neb. 294, 75 N. W. 832.

20. C. v. Merrifield, 4 Met. 468. See ante, § 320 (1), note.

21. Warriner v. P., 74 Ill. 346. And see further as to variance, C. v. O'Keefe, 121 Mass. 59; Reg. v. Keena (Lew Rep.), 1 C. C. 113, 11 Cox C. C. 123.

22. Rex v. Johnson, 3 M. & S. 539; Mayo v. S., 30 Ala. 32. See, Wall v. S. (Ala. 1911), 56 So. 57.

23. Vol. I, § 457 (2); S. v. Porter, 26 Mo. 201. See Jackson v. S., 76 Ga. 551; S. v. Malim, 14 Nev. 288; Gravatt v. S., 25 Ohio St. 162; Higbee v. S., 74 Neb. 331, 104 N. W. 748.

is sometimes within the election of the prosecutor.[24] Generally it may be either in the one where the prisoner received the thing, or in that wherein he denied its receipt, or neglected to charge himself in the books of account.[25] But if he takes personal property in one county to deliver in another, he is not liable in the former should the intent to embezzle it not be entertained until he has it in the latter.[26] In the absence of evidence as to when the criminal intent was formed,[27] and especially of any carrying of the thing into another county,[28] proof of the receipt of it in the county of the indictment may suffice to the allegation of venue.[29]

§ 327. *The Evidence:*—

1. **Some Questions**—relating to what may be deemed the evidence, of a nature peculiar to this offense, were considered in "New Criminal Law," under the inquiry after the act of embezzlement.[30] Aside from them, there is nothing distinguishing it from others as to the evidence. Thus,—

2. **All the Elements**—of the offense must be proved.[31] Hence,—

3. **Larceny.**—Where the defendant asked a girl to lend him a small sum of money, whereupon she handed him a larger to count in her presence, and he refused to return

24. Vol. I, § 61 (2).

25. Reg. v. Rogers, 3 Q. B. D. 28; Rex v. Taylor, 2 Leach, 974, Russ. & Ry. 63, 3 B. & P. 596; Rex v. Hobson, Russ. & Ry. 56, 2 Leach, 975; Reg. v. Murdock, 2 Den. C. C. 298, 8 Eng. L. & Eq. 577; P. v. McKinney, 10 Mich. 54; And see Ex parte Palmer, 86 Cal. 631, 25 P. 130; Soule v. S., 71 Ga. 267; Ter. v. Hale, 13 N. M. 181, 81 P. 583.

26. P. v. Murphy, 51 Cal. 376. Compare with this Reg. v. Rogers, supra.

27. Rex v. Hobson, supra.

28. S. v. New, 22 Minn. 76; Spalding v. P., 172 Ill. 40, 49 N. E. 993.

29. And see C. v. Concannon, 5 Allen, 502; Reg. v. Rogers, 3 Q. B. D. 28, 14 Cox C. C. 22.

30. New Crim. Law, II, §§ 372-378.

31. Thomas v. Dunaway, 30 Ill. 373; Ratteree v. S., 77 Ga. 744; S. v. Lyons (Del. 1911), 80 A. 976. An allegation that money was embezzled is sustained by proof that a check was drawn on a bank. Ter. v. Hale, 13 N. M. 181, 190, 81 P. 583; Bartley v. S., 53 Neb. 310, 73 N. W. 744.

any, and fled with the whole, embezzlement was held not proved; because these facts do not constitute it, but larceny.[32]

4. **Other Instances**—of like embezzlements may be shown in aid of the proofs of the criminal intent.[33] And—

5. **Straightened Circumstances**—of the defendant, creating temptations, and a need of that whereof the embezzlement is charged, may, in connection with other evidence, be admissible.[34]

6. **Books of Account,**—public documents, and the like, are competent when within the ordinary rules of evidence.[35]

7. **The Ownership**[36]—of things embezzled cannot be proved by the declarations of the alleged owner, though dead.[37]

8. **The Delivery**—of the property to the defendant sufficiently appears if made through his agent.[38]

9. **The Agreement for Service,**—if in writing, should be produced, or its non-production accounted for.[39]

32. C. v. O'Malley, 97 Mass. 584.

33. Ante, §§ 189, 235 (2), 261 (2), and the places there referred to; Reg. v. Richardson, 8 Cox C. C. 448; C. v. Tuckerman, 10 Gray, 173, 197; C. v. Shepard, 1 Allen, 575; Jackson v. S., 76 Ga. 551; P. v. Gray, 66 Cal. 271; P. v. Neyce, 86 Cal. 393, 24 P. 1091; P. v. Bartnett, 15 Cal. Ap. 89, 113 P. 879.

34. Bulloch v. S., 10 Ga. 47, 54 Am. D. 369.

35. P. v. McKinney, 10 Mich. 54; Shivers v. S., 53 Ga. 149; Reg. v. Overton, Dears, 308, 6 Cox C. C. 277; Hockenberger v. S., 49 Neb. 706, 68 N. W. 1037. Entries by others in knowledge of accused. P. v. Rowland, 12 Cal. 6, 106 P. 428; Willis v. S., 134 Ala. 429, 33 So. 226. Books of account kept by accused. S. v. Patterson, 66 Kan. 447, 71 P. 860; Willis v. S., 134 Ala. 429, 33 So. 226. Checks drawn by accused. DeLeon v. Ter., 9 Ariz. 161, 80 P. 348; Eatman v. S., 48 Fla. 21, 37 So. 576. Expert accountant who has carefully examined books of accused may testify how much the shortage now and how much at any particular date. Ritter v. S., 70 Ark. 472, 69 S. W. 262. And a witness may be permitted to point out particular entries showing embezzlement on the books. S. v. Steers, 12 Idaho, 174, 85 P. 104.

36. Ante, § 320 (2).

37. C. v. Sanders, 14 Gray, 394, 77 Am. D. 335.

38. S. v. Hinckley, 38 Me. 21. Not necessary to state from whom money received. S. v. Mathis, 106 La. 263, 30 So. 834.

39. In re Clapton, 3 Cox C. C. 126; P. v. Hust, 49 Cal. 653.

10. **The Permission of the Owner**—to convert the thing to the defendant's use, if it eixsts, may be shown.[40]

§ 328. **Differing Terms of Statutes.**—Practically the foregoing doctrines are more or less modified under statutes in terms other than those with reference to which they were written.[41] The indictment must cover the statute on which it is drawn;[42] it ordinarily need do no more.[43] Again,—

§ 329. **Different States.**—Partly owing to differing views of judges, and partly to diversities in the general criminal-law legislation of the States, like statutory words may not have in all the same effect. In a note,[44] some ad-

40. Henderson v. S., 1 Tex. Ap. 432. See U. S. v. Taintor, 11 Blatch. 374; Ter. v. Hale, 13 N. M. 181, 81 P. 583. From whom money received need not be alleged nor value. Richburger v. S., 90 Miss. 806, 44 So. 772; S. v. Meeker, 72 N. J. L. 210, 61 A. 681.

41. S. v. Walton, 62 Me. 106; C. v. Bennett, 118 Mass. 443.

42. S. v. Foster, 11 Iowa, 291; S. v. Munch, 22 Minn. 67; S. v. New, 22 Minn. 76; U. S. v. Okie, 5 Blatch. 516; Grider v. S., 133 Ala. 188, 32 So. 254.

43. P. v. Garcia, 25 Cal. 531; Alderman v. S., 57 Ga. 367; U. S. v. Patterson, 6 McLean, 466; Smedley v. Com., 138 Ky. 1, 127 S. W. 485.

44. **Alabama.** An indictment in the form prescribed by the Code is good. Lowenthal v. S., 32 Ala. 589; Mayo v. S., 30 Ala. 32. Repayment immaterial. Wall v. S., 2 Ala. Ap. 157, 56 So. 57. An allegation that accused "embezzled money" "which came into his possession by virtue of his employment as such agent" sufficiently charges ownership. Willis v. S., 134 Ala. 429, 33 So. 226.

Arkansas. Under a statute to punish embezzlement by every officer "who has taken an oath of office," these statutory words must appear in allegation. Wood v. S., 47 Ark. 488, 1 S. W. 709. So, an indictment against a county treasurer must allege a settlement of his accounts, etc. S. v. Govan, 48 Ark. 76, 2 S. W. 347. Against county surveyor. Turner v. Blount, 49 Ark. 361, 5 S. W. 589. Intent to embezzle. Dotson v. S., 51 Ark. 119, 10 S. W. 18; Fleener v. S., 58 Ark. 98, 23 S. W. 1.

California. An indictment against a bailee for the embezzlement of gold dust and coin must not only aver ownership and value as in larceny, but also set out particularly the bailment and its character, and charge the conversion. P. v. Cohen, 8 Cal. 42, 43, 44. See further, as to this. Stat. Crimes, § 422. And see P. v. Johnson, 71 Cal. 384, 12 P. 261. An instrument set out in the indictment cannot be proved by copy without accounting for the original and showing its execution. P. v. Hust, 49 Cal. 653.

judications are given in the order of the States; yet not everything in the note is to be taken as limited in doctrine to the one State.

And see ante, § 327. How proceed when a variance has been shown. Ex parte Nicholas, 91 Cal. 640, 28 P. 47. Variance in proof of embezzling money. P. v. Meseros, 16 Cal. Ap. 277, 116 P. 679. Indictment need not set out particulars of fiduciary relation. P. v. Goodrich, 142 Cal. 216, 75 P. 796.

Delaware. In embezzlement by bailee the bailment must be proved, also the interest to defraud. S. v. Lyons (Del. 1911), 80 A. 976. As to sufficiency of indictment under the statute. 3 Penn. 330, 63 A. 231.

Georgia. In an indictment against an officer of a bank for embezzling its funds, bank bills are sufficiently described by amounts, values, issued by what bank, and by whom signed and countersigned, without specifying their numbers and dates. Bulloch v. S., 10 Ga. 47, 54 Am. D. 369; Cody v. S., 100 Ga. 105, 28 S. E. 106. And see generally of the indictment. Snell v. S., 50 Ga. 219; Hoyt v. S., 50 Ga. 313; Cory v. S., 55 Ga. 236. Against tax-collector. Fuller v. S., 73 Ga. 408; Hayes v. S., 114 Ga. 25, 40 S. E. 13.

Illinois. Indictment, Ker v. P., 110 Ill. 627, 51 Am. R. 706; Weiner v. P., 186 Ill. 503, 58 N. E. 378.

Indiana. S. v. Smith, 72 Ind. 549; Sherrick v. S., 167 Ind. 345, 79 N. E. 193.

Iowa. Sufficiency of evidence, S. v. Baldwin, 70 Iowa, 180, 30 N. W. 476. Proof of intent. S. v. Carmean, 126 Iowa, 291, 102 N. W. 97, 106 Am. St. 362.

Kansas. Charge to jury, S. v. Smith, 13 Kan. 274, 278, 279. Scope of statute, S. v. Small, 26 Kan. 209. S. v. Hayes, 59 Kan. 61, 51 P. 905.

Kentucky. A sufficient indictment, Johnson v. C., 5 Bush, 430; Com. v. Fisher, 113 Ky. 491, 24 Ky. L. 300, 68 S. W. 855.

Louisiana. On a charge of embezzlement, the defendant cannot be convicted of a breach of trust. S. v. Reonnals, 14 La. Ann. 278. It suffices to set out all the elements of the offense, though not in the words of the statute, if in those of like import. S. v. Eames, 39 La. 986, 3 So. 93.

Massachusetts. For an indictment fatally incomplete in its averments, see C. v. Smart, 6 Gray, 15. For one good, see C. v. Hussey, 111 Mass. 432; also, and as to negativing the consent of the owners, C. v. Smith, 116 Mass. 40. And see C. v. Bennett, 118 Mass. 443. An indictment against a bank officer for embezzling its funds or a deposit must aver a specific act of fraud—only one offense in one count,—and it must be proved as laid. C. v. Wyman, 8 Met. 247. And see C. v. Shepard, 1 Allen, 575. Also C. v. Concannon, 5 Allen, 502; C. v. Tuckerman, 10 Gray, 173; C. v. Butterick, 100 Mass. 1, 97 Am. D. 65. Some other cases are, C. v. Gateley, 126 Mass. 52; C. v. Doherty, 127 Mass. 20; C. v. Pratt, 137 Mass. 98; C. v. Sawtelle, 141 Mass. 140, 5 N. E. 312; Com. v. Parker, 165 Mass. 526, 43 N. E. 526.

Michigan. Plea that defendant was attorney-at-law. P. v. Converse,

§ 330. 1. **The English Authorities**—on this subject are, it should be remembered, all modern, and not binding in our States; though, of course, our courts will look into them with respect. Again,—

74 Mich. 478, 16 Am. St. 648, 42 N. W. 70.

Minnesota. Embezzlement by carrier. S. v. Mims, 26 Minn. 191. By bailee. S. v. Comings, 54 Minn. 359, 56 N. W. 50.

Missouri. Non-consent to the conversion may be inferred from circumstances the testimony of the master is not exclusively primary evidence. S. v. Porter, 26 Mo. 201. And see this case as to proving a demand and refusal. By statute, the incorporation of a company employing the accused may be proved by parol. S. v. Cheek, 63 Mo. 364. Compare with Reg. v. Essex, Dears. & B. 369, 7 Cox C. C. 384. And see, for other questions, S. v. Bittinger, 55 Mo. 596; S. v. Flint, 62 Mo. 393; S. v. Heath, 70 Mo. 565; S. v. Findley, 101 Mo. 217, 223, 14 S. W. 185; S. v. Manley, 107 Mo. 364, 17 S. W. 800.

Nevada. Ex parte Ricord, 11 Nev. 287; Ricord v. Central Pac. Rld., 15 Nev. 167.

New Jersey. An indictment against the cashier of a bank for embezzling its funds need only charge that he "converted the property of the bank," with intent wrongfully to make use of it; following the words of the statute. Nor need it add that he did this "as cashier," or that the funds were intrusted to him in this capacity, or that his intent was to defraud the corporation. A count charging a conversion of "$19,000 of money and $19,000 of bank-notes" is bad for uncertainty. The number and denomination of the coins and notes, and the value of the notes, not of the government coins, should be stated. S. v. Stimson, 4 Zab, 9. Contra. S. v. Bartholomew, 69 N. J. L. 160, 54 A. 231; S. v. Barr, 61 N. J. L. 131, 38 A. 817.

New York. An indictment under 2 Rev. Sts. 678, § 59, must aver that the defendant was a "clerk" or "servant" of some person (or an officer or agent of a corporation), and that the property came to his possession or care by virtue of such employment. A count charging that he received it as the "agent" of an individual is bad. Nor is it cured by proceeding to aver that the property came to the defendant "as such servant as aforesaid," and that while he was "such servant" he converted it; the construction being that by "such servant" is meant such a servant as an agent may be. The reason is that an indictment on a statute must state all the facts constituting by its terms the offense, so as to bring the accused perfectly within its provisions. P. v. Allen, 5 Denio, 76. For a form against husband and wife for embezzling the property of the superintendent of the poor, see Coats v. P., 4 Par. Cr. 662. For other questions, P. v. Lyon, 99 N. Y. 210, 1 N. E. 673; Humphrey v. P., 18 Hun, 393.

North Carolina. S. v. Lanier, 89 N. C. 517.

Ohio. Brown v. S., 18 Ohio St.

2. **The Decisions in One of our States**—are regarded in another State simply as the modern English ones are, and not conclusive there. Hence—

3. **Correcting Errors.**—The practitioner need not be quite without hope, while pointing out to his court departures from principle in the adjudications from other States and from England, and urging it not to follow them.

II. *In Particular Cases.*

§ 331. **English.**—Some illustrations, condensed from the English books, will close this chapter.

Early Statute.—By 7 & 8 Geo. 4, c. 29, § 47, recited in "New Criminal Law,"[45] "any clerk," etc. was made indictable who should, "by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master," and "fraudulently embezzle the same or any part thereof;" one consequence whereof was that he should "be deemed to have feloniously stolen the same from his master."

§ 332. 1. **As to the Procedure.**—By § 48, also given in "New Criminal Law,"[46] the indictment was simplified[47] by providing that "any number of distinct acts of embez-

496; S. v. Morton, 21 Ohio St. 669; Campbell v. S., 35 Ohio St. 70; S. v. Kusnick, 45 Ohio St. 535, 15 N. E. 481.

Pennsylvania. C. v. Newcomer, 49 Pa. 478; Culp v. C., 109 Pa. 363.

Rhode Island. S. v. Snell, 9 R. I. 112.

South Carolina. Description of notes. S. v. Ashe, 89 S. C. 160, 71 S. W. 827.

Texas. S. v. Johnson, 21 Tex. 775; Wise v. S., 41 Tex. 139; S. v. Longworth, 41 Tex. 162; Gibbs v. S., 41 Tex. 491; Griffin v. S., 4 Tex. Ap. 390; Strong v. S., 18 Tex. Ap. 19; Cohen v. S., 20 Tex. Ap. 224.

Vermont. S. v. Hopkins, 56 Vt. 250.

United States. U. S. v. Hartwell, 6 Wal. 385; U. S. v. Clark, Crabbe, 584; U. S. v. Taintor, 11 Blatch. 374; U. S. v. Cook, 17 Wall. 168; U. S. v. Hall, 98 U. S. 343; U. S. v. Benecke, 98 U S. 447; U. S. v. Fish, 24 Fed. Rep. 585. By Federal clerk or employer. U. S. v. Allen, 150 Fed. 152; Dimmick v. U. S., 121 F. 638, 57 C. C. A. 664.

45. New Crim. Law, II, § 322.

46. Ib., § 375.

47. Ante, § 319 (2).

zlement, not exceeding three," committed by the defendant "against the same master, within the space of six calendar months from the first to the last of such acts," might be charged in the indictment; also, that it should "be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security." And proof of the embezzlement of any amount should sustain this allegation.

2. **With Us.**—A statute in substance like this[48] has been held in Massachusetts to be constitutional.[49] And there can be little doubt that such would be the result in our States generally.[50]

§ 333. 1. **The Allegation thus Authorized**—was, that on, etc., at, etc., the defendant, B, "being then and there employed as clerk to A, did, by virtue of his said employment, then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said A, his master, and the said money then and there fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say that the said B, then and there, in manner and form aforesaid, the said money, the property of the said A, his said master, from the said A feloniously did steal, take, and carry away." And—

2. **Count for other Embezzlements.**—If the defendant was to be charged with other embezzlements within six months, a count was added "that the said B afterwards, and within six calendar months from the time of the committing of the said offense in the first count of this indictment charged and stated, to wit, on, etc., at, etc., being then and there employed as clerk to the said A, did, by virtue of such last-mentioned employment, then and there, and whilst he was so employed as last aforesaid, receive and take into

48. Mass. Gen. Sts., c. 161, § 42.

49. C. v. Bennett, 118 Mass. 443.

50. Vol. I, §§ 95-112; Hoyt v. S., 50 Ga. 313.

his possession certain other money to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said A, his said master, and the said last-mentioned money then and there, within the said six calendar months, fraudulently and feloniously did embezzle; and so, etc. [as in the first count to the end]."[51]

§ 334. **In Explanation hereof,**—Archbold says: "The indictment must show, by express words, that the different sums were embezzled within the six months."[52] Since the statute, it is not "necessary that the exact amount or value of the thing embezzled should be stated.[53] The indictment must allege the goods, etc., embezzled to be the property of the master;[54] and it has been said that it must show the defendant was servant, etc., at the time.[55] . . . It is not necessary to state whom the money, etc., was received.[56] But as this may operate as a hardship upon the prisoner, the judge before whom he is to be tried will upon application order the prosecutor to furnish the prisoner with a particular of the charge."[57]

§ 335. **Proof of Thing received.**—"If," continues this author,[58] "the indictment allege that the defendant received chattels, the articles described, or some part of them, must be proved as in larceny; but if the receipt of 'money' be alleged, the prosecutor may give in evidence the receipt of any species of coin or valuable security, or a receipt of any amount, although the particular species of coin or val-

51. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 275, 276.

52. Reg. v. Purchase, Car. & M. 617. An indictment containing three charges of embezzlement should not only aver that the moneys were received within six months, but also that they were embezzled within six months. Reg. v. Noake, 2 Car. & K. 620.

53. Rex v. Carson, Russ. & Ry. 303.

54. Rex v. McGregor, 3 B. & P. 106, Russ. & Ry. 23; Rex v. Beacall, 1 Moody, 15, 1 Car. & P. 454.

55. Rex v. Somerton, 7 B. & C. 463. See, however, Reg. v. Lovell, 2 Moody & R. 236.

56. Rex v. Beacall, 1 Car. & P. 454; ante, § 323a.

57. Rex v. Bootyman, 5 Car. & P. 300; Rex v. Hodgson, 3 Car. & P. 122.

58. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 278-281.

uable security of which such amount was composed shall not be proved. 7 & 8 Geo. 4, c. 29, § 48. A variance between the indictment and the evidence, as to the amount received, is immaterial.''[59] Again,—

§ 336. **Proof of the Embezzlement.**—''The usual presumptive evidence is that the defendant never accounted with his master for the money, etc., so received by him, or denied his having received it. The prosecutor gave to his housekeeper, the defendant, a sum of money to pay to the overseer; and upon an indictment for embezzling the sum, the overseer proved that he never had received that or any other sum from the defendant; but it was holden that the non-payment of the money to the overseer did not prove an actual embezzlement, but merely a non-application of the money as directed.[60] So, where the prisoner charged himself in his master's book with money received by him, but did not pay it over to the master, Vaughan, B. held that an embezzlement was not proved.[61] And if, instead of denying the appropriation of the money, the party in rendering his account admits it, alleging a right in himself, however unfounded, or setting up an excuse, however frivolous, he cannot be convicted of embezzlement, which implies secrecy and concealment;[62] even though he afterwards abscond and do not pay over the money.[63] So, also, the mere proof of the receipt of the money by the defendant, and his not having entered it in his books, without some evidence to show that he has denied the receipt of it, or the like, is not sufficient to convict.[64] But—

§ 337. **To Continue.**—''Where it is the servant's duty to account for and pay over the moneys received by him at stated times, his not doing so wilfully is an embezzlement, although he do not actually deny the receipt of

59. Rex v. Carson, Russ. & Ry. 303.

60. Rex v. Smith, Russ. & Ry. 267.

61. Rex v. Hodgson, 3 Car. & P. 422.

62. Reg. v. Norman, Car. & M. 501.

63. Reg. v. Creed, 1 Car. & K. 63.

64. Rex v. Jones, 7 Car. & P. 833.

them.[65] Where the defendant received payment of a debt from one of his master's customers in Bank of England notes, but accounted with his master for £6 less than he received; and afterwards delivered some Bank of England notes to his master upon another account; it being argued for the defendant that these must be presumed to be the same bank-notes which were received from the customer, and being actually delivered to the master, could not be said to be embezzled; Bayley, J. ruled that these notes, to the amount of £ 6, must be deemed to have been embezzled within the meaning of the act, the moment the defendant accounted for £6 less than he received, and that his afterwards paying these identical notes to his master in another account made no difference; which decision was afterwards confirmed by the judges.[66] The difficulty in this case, and in that of Rex v. Hebb,[67] which arose from the necessity of proving the embezzlement of some specific note or coin, is removed by the recent statute. If the embezzlement be alleged to be of money, without specifying any particular coin or valuable security, such allegation, so far as regards the description of the property, will be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. 7 & 8 Geo. 4, c. 29, § 48. In Rex v. Grove,[68] a majority of the judges are reported to have held that since this statute, an indictment for embezzlement might be supported by proof of a general deficiency

65. Reg. v. Jackson, 1 Car. & K. 384.

66. Rex v. Hall, 3 Stark. 67, Russ. & Ry. 463.

67. Rex v. Hebb, 2 Russ. Crimes (1st Ed.), 1244.

68. Rex v. Grove, 1 Moody, 447, 7 Car. & P. 635.

of moneys that ought to be forthcoming, without showing any particular sum received and not accounted for. But see Reg. v. Lloyd Jones,[69] where it was stated that the decision in Rex v. Grove proceeded upon the peculiar facts of that case, and not upon any such general principle."[70]

§ 338. *Under other English Statutes:—*

Embezzlement by Bankers, etc.—By 7 & 8 Geo. 4, c. 29, § 49, it was among other things enacted that "if any money, etc., shall be intrusted to any banker, etc., with any direction in writing to apply such money or any part thereof, or, etc., for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit such money, etc., every such offender shall be guilty of a misdemeanor," etc.

§ 339. **An Approved Indictment**—on this was that on, etc., at, etc., "A did intrust B [the defendant], the said B then and there being a banker, with a certain large sum of money, to wit, the sum of one hundred pounds, with a direction to the said B, in writing, to apply the said sum of money for a certain purpose then and there specified in the said direction; and that the said B, banker as aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, in violation of good faith, and contrary to the purpose so as aforesaid specified, unlawfully did convert to his own use and benefit the said sum of money so to him intrusted as aforesaid."[71]

§ 340. **Direction in Writing.**—The indictment must charge that the direction for the application of the money was in writing.[72]

§ 341. **The Evidence.**—"Prove," says Archbold, "that the defendant was a banker, etc., as stated in the indict-

69. Reg. v. Jones, 8 Car. & P. 288.

70. See also Reg. v. Chapmen, 1 Car. & K. 119. Compare these several sections with New Crim. Law, II, §§ 372-378.

71. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 283.

72. Reg. v. Golde, 2 Moody & R. 425.

ment—that the money, etc., was intrusted to him—that directions in writing were given for the application of the money, etc.; this must be proved by the production of the directions, or by secondary evidence after notice to produce the original; and, lastly, prove that the defendant, instead of applying the money, etc., as directed, converted it to his own use and benefit. If the particular purpose be stated in the indictment, the evidence must correspond with the allegation. An allegation of a specific direction, to invest the proceeds of valuable securities in the funds, is not supported by evidence of a direction to invest in funds in the event of any unexpected occurring." [73]

§ 342. **Another Form.**—When a "valuable security" is the thing embezzled under this statute, contrary to statutory words not given above, the indictment may charge that on, etc., at, etc., A "did intrust" to the defendant B, for safe custody, the said B then and there being a banker, a promissory note of one J. P. for the payment of twenty pounds, without any authority to him the said B to sell, negotiate, transfer, or pledge the said promissory note; and that the said B, banker and agent as aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, in violation of good faith, and contrary to the object and purpose for which promissory note was intrusted to him as aforesaid, unlawfully did negotiate and convert to his own use and benefit the said promissory note." [74]

§ 343. **Embezzlement by Factor.**—Under 5 & 6 Vict. c. 39, § 6, not necessary to be here inserted, it may be alleged that on, etc., at, etc., "A did intrust to B [the defendant], the said B then and there being an agent of him the said A, ten bales of cotton, of the value of fifty pounds ['intrusted with the possession of goods, or of the documents of title to goods']; and that the said B, late of the parish aforesaid, in the county aforesaid, agent as aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, contrary to and without the authority of the said A,

73. Rex v. White, 4 Car. & P. 46.

74. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 284, 285.

for his own benefit, and in violation of good faith, unlawfully did make a deposit of the said ten bales of cotton with one J. P., as and by way of a pledge, lien, and security for a certain sum of money, to wit, the sum of fifty pounds, then advanced by the said J. P. to him the said B."[75]

75. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 286.

CHAPTER CXVI.

EMBRACERY.

Consult—for the law of this offense, New Crim. Law, I, § 468; II, §§ 384-389. For the indictment, etc., Dir. & F., §§ 850, 851.

§ 344. **Not often,**—in modern times, is this offense, too frequently committed, and most prejudicial to the administration of justice, made the subject of indictment. Prosecuting officers would discharge an obvious duty should they be vigilant in seeking evidence of it, and bringing the offenders to punishment.[75a]

§ 345 **Few Precedents**—of the indictment are given in the books. Tremaine has one, adapted by the late Solicitor-General Davis to the Massachusetts practice as he understood the law, and published in his "Precedents." He said: "It is the only one to be met with either in that collection, or in Coke's Entries, Stark. Crim. Pl., Cro. C. C., or Cro. C. A. There are two other precedents in an ancient book, containing precedents of indictments, informations, etc., entitled *Officium Clerici Pacis.*"[76]

§ 346. **As to the Form of the Indictment,**—there is more doubt than in offences oftener adjudicated upon, and for which precedents have become numerous. In substance it is that on, etc., at, etc., the defendant, knowing a jury to have been impanelled to try an issue described, in a specified court, and "being," says the form in Tremaine, "a common embracer of jurors," but the necessity for this is doubt-

75a. Some recent cases are, In re Haymond, 121 Cal. 385, 53 P. 899; S. v. Dankwardt, 107 Iowa, 704, 77 N. W. 495. Where accused told a juror to "see that right was done." S. v. Williams, 136 Mo. 293, 38 S. W. 75, in which one, only summoned as a juror, was spoken to, but compare with this the later cases of S. v. Williford, 111 Mo. Ap. 668, 86 S. W. 570; and, P. v. Glen, 71 N. Y. S. 893, 64 A. D. 167; affirmed in 173 N. Y. 395, 66 N. E. 112.

76. Davis Prec. 113 and note.

ful, and devising, etc. "to hinder the due and lawful trial," etc., then and there unlawfully, etc., on behalf of the defendant in the cause, "did solicit and persuade one B. S. of, etc., one of the jurors," etc., knowing him to be such juror; proceeding to state the particular facts.[77]

§ 347. **Rendering Verdict.**—The form in Tremaine goes on to aver the rendering of a verdict by the jury; but this is unnecessary, since the attempt completes the offense.[78]

77. Rex v. Brooks, Trem. P. C. 175. Compare with Dir. & F., § 850; S. v. Davis, 112 Mo. Ap. 346, 87 S. W. 33. "Did unlawfully attempt to influence (another) as a juror" sufficiently charges accused knew he was a juror. S. v. Dankwardt, 107 Iowa, 704, 77 N. W. 495. Indictment must state the name of the juror. S. v. Nunley, 185 Mo. 102, 83 S. W. 1074. Allegation that person to be improperly influenced was member of grand jury previously drawn, is sustained by proof, his name had been drawn and published, but he had not been formally summoned. P. v. Glen, 172 N. Y. 395, 66 N. E. 112.

78. New Crim. Law, II, § 389; Davis Prec. 114.

CHAPTER CXVII.

ENGROSSING.

Consult—for the law of Forestalling, Regrating, and Engrossing, New Crim. Law, I, §§ 518-528.

§ 348. **For the Indictment,**—Chitty's precedents are,—"That A, late of, etc., on, etc., at, etc., aforesaid, did engross and get into his hands, by buying of and from divers persons to the jurors unknown, a large quantity, to wit, four thousand quarters, of wheat, with intent to sell the same again for lucre, gain, and profit [*or* at an unreasonable profit], to the evil example, etc., and against the peace," etc.

Again: "That A, late of, etc., on, etc., at, etc., did unlawfully engross and get into his hands by buying of and from one S, fifty quarters of wheat, with the intent to sell the same again at an unreasonable profit, to the evil example, etc., and against the peace," etc.[79]

§ 349. **The Quantity**—of each article engrossed must be stated.[80] Simply to say that it was a great quantity is ill.[81]

§ 350. **How the Form with Us.**—It should not be taken for granted that an indictment in one of the above forms would be good in every one of our States. The law and the allegation must correspond. The pleader should consider what his own court will probably hold the nature of the offense and its limits to be, then draw the indictment accordingly; using the forms here given only as helps, not as absolute guides.

79. 2 Chit. Crim. Law, 534, 535.

80. Rex v. Gilbert, 1 East, 583; Anonymous, Cro. Car. 380, 381.

81. Rex v. Foster, 1 Ld. Raym. 475. And see Reg. v. Mackarty, 2 Ld. Raym. 1179, 1181; Rex v. Whilder, 2 Bulst. 317; Rex v. Lesingham, 1 Lev. 299; Rex v. Wright, 12 Mod. 47.

For Entry, Forcible, see Forcible Entry and Detainer; Escape, see Prison Breach, etc.; Estray Animals, see Stat. Crimes.

CHAPTER CXVIII.

EXPOSURE OF PERSON.

Consult—for the law of this offense, New Crim. Law, I, §§ 1125-1134. For the indictment, etc., Dir. & F., §§ 802-804. For miscellaneous questions, see the indexes to this series of books. Look also into the title NUISANCE.

§ 351. **In drawing the Indictment,**—attention should be paid to some differences of opinion as to the law of this offense, explained in "New Criminal Law."[82] For a court requires every indictment to be adjusted to its own interpretations. An English common law form charges that the defendant, at a time and place stated, "devising," etc.[83] "on a certain public and common highway [there situate[84]], in the presence of divers liege subjects of our lady the queen then and there being, and within sight and view of divers other liege subjects through and on the said highway then and there passing and repassing, unlawfully, wickedly, and scandalously did expose to the view of the said persons so present, and so passing and repassing as aforesaid, the body and person of him the said J. S. naked and uncovered, for a long space of time, to wit, for the space of one hour."[85]

§ 352. **That the Exhibition was seen**—seems by the Eng-

82. New Crim. Law, I, § 1125 et seq.

83. Doubtless needless. Yet see Dir. & F., § 802. See also Ib., §§ 803, 804.

84. That these words were better omitted, while possibly some courts might hold the proof of the minor locality within the county to be necessary, see ante, §§ 41, 103 (2), 105 (2), 111, 135; post, § 352; Hazle v. S., 20 Ark. 156; S. v. Gardner, 28 Mo. 90.

That the place was public. (New Crim. Law, §§ 1128, 1129), must doubtless always in some way affirmatively appear. Lorimer v. S., 76 Ind. 495.

85. Archb. Crim. P. & Ev. (10th Lond. Ed.) 655 (19th Ed.) 987. An indictment in substantially this form was adjudged good in C. v. Haynes, 2 Gray, 72, 61 Am. D. 437.

lish authorities necessary to be averred.[86] But in North Carolina it suffices to say that on, etc., in a county stated, the defendant, "being an evil-disposed person, and contriving and intending to debauch and corrupt the morals of the citizens of said county, on a certain public highway in said county did indecently and scandalously expose to public view the private parts of him the said" defendant.[87]

§ 353. 1. **"Great Scandal."**—The above English form has, in its conclusion, "to the great scandal of the said liege subjects," etc.—plainly superfluous. So—

2. **"Evil Example."**—The North Carolina form has "to the evil and pernicious example of all others in like case offending,"—words equally needless.[88]

3. **"To the Common Nuisance."**—This conclusion has been adjudged unneceessary, though the offense is such nuisance.[89]

§ 354. 1. **On a Statute,**—the indictment more or less departs from the above forms.[90] Thus,—

86. New Crim. Law, I, §§ 1126 (2), 1127; Reg. v. Webb, 1 Den. C. C. 338, 2 Car. & K. 933, 3 Cox, C. C. 183. In Morris v. S., 109 Ga. 351, 34 S. E. 577 an indecent exposure in a place where it could be seen by only one person is not a "notorious act of public indecency." Under the statute containing such words it is necessary to allege that the act was committed in a place where it could have been seen by more than one person. Where an indecent exposure is alleged, it must be in a public place. S. v. Goldstein, 72 N. J. L. 336, 62 A. 1006.

87. S. v. Roper, 1 Dev. & Bat. 208. Compare this with New Crim. Law, I, §§ 1126, 1127; Reg. v. Webb, supra; Reg. v. Elliott, Leigh & C., 103; S. v. Rose, 32 Mo. 560; Moffit v. S., 43 Tex. 346; S. v. Griffin, 43 Tex. 538. Unnecessary, to allege that exposure was made to a particular person. S. v. Bauguess, 106 Iowa, 107, 76 N. W. 508; or to allege and prove that it was seen by others. S. v. Martin, 125 Iowa, 715, 101 N. W. 637. But usually it must be alleged and proved that the exposure was in the sight of others, or in such a place that it was liable to be seen by others, was made for that purpose or with a reckless disregard and criminal disregard for the decencies of life. S. v. Martin, 125 Iowa, 715, 718, 101 N. W. 637; citing, Van Houten v. S., 46 N. J. L. 16, 50 Am. 397.

88. Vol. II, § 647 (1).

89. C. v. Haynes, 2 Gray, 72, 61 Am. D. 437. And see ante, § 105 (2), note, 200 (2), post, §§ 862-864.

90. S. v. Griffin, 43 Tex. 538; Ardery v. S., 56 Ind. 328.

2. **In Texas**—it suffices to say that on, etc., at, etc., the defendant did "designedly make an obscene and indecent exhibition of his person in public."[91]

3. **In Missouri**,—the allegation has been sustained that on, etc., at, etc., the defendant was "guilty of an open and notorious act of public indecency, grossly scandalous, by then and there exhibiting and exposing his private parts in presence of a male and female;" for, said Richardson, J. "the indictment not only charged the defendant generally, in the words of the statute, with being 'guilty of an open and notorious act of public indency, grossly scandalous,' but sepcified with sufficient certainty the act that constituted the offense."[92]

§ 355. **An Arkansas Statute**—makes punishable one "who shall appear in public places naked, or partly so, with the intent of making a public exhibition of his nudity, or who shall make any obscene exhibition of his person." Under the first clause, the allegation may be that on, etc., at, etc., the defendant "unlawfully did appear in a certain public place, partly naked, with the intent of making a public exhibition of her nudity;" under the second, that, etc., she "unlawfully did make an obscene exhibition of her person"[93]

91. S. v. Griffn, supra.

92. S. v. Gardner, 28 Mo. 90. And see S. v. Rose, 32 Mo. 560. "Willfully, unlawfully, and designedly making an open, indecent and obscene exposure of his person in a public place" is enough. S. v. Bauguess, 106 Iowa, 107, 76 N. W. 508. Under a statute punishing one who "lewdly exposes," etc., the indictment must state that the exposure was "lewdly" made. S. v. Stark, 81 Miss. 397, 33 So. 175.

93. S. v. Hazle, 20 Ark. 156.

CHAPTER CXIX.

EXTORTION.

Consult—for the law of this offense, New Crim. Law, II, §§ 390-408. For the indictment, etc., Dir. & F., §§ 413-417. For various miscellaneous questions, see the indexes to this series of books. See also the titles MALFEASANCE AND NONFEASANCE IN OFFICE, THREATENING LETTERS, ETC.

§ 356. **The Elements of this Offense,**—to be alleged and proved, are,—

1. That the defendant was an officer, either *de jure* or *de facto*.[94]

2. That he either demanded or received a fee for real or pretended services in his office.

3. That it was in excess of what the law prescribed, or was not yet due, or the law gave none.

4. That herein the defendant acted under color of his office, and from motives deemed in law corrupt.[95]

§ 357. **The Indictment**—charges that on, etc., at, etc., the defendant,—

1. "Being one of the constables of," etc., or "treasurer of the county of, etc., or some other officer specified,[96]

94. New Crim. Law, II, § 392; S. v. Hanna, 99 Me. 224, 58 Atl. 1061; Kirby v. S., 57 N. J. L. 320, 31 Atl. 213; P. v. McLaughlin, 2 Ap. Div. (N. Y.) 419, 37 N. Y. S. 1005; P. v. Summers, 40 Misc. (N. Y.) 384, 82 N. Y. S. 297, 17 N. Y. Cr. 321; Com. v. Wilson, 30 Pa. Sup. Ct. 26; Com. v. Saulsbury, 152 Pa. St. 554, 559, 25 Atl. 610; S. v. Cooper, 129 Tenn. 549, 113 S. W. 1048; Hanley v. S., 125 Wis. 396, 104 N. W. 457; U. S. v. Deaver, 14 Fed. 595. Indictment alleging a non-existing office is demurrable. Herrington v. S., 103 Ga. 318, 29 S. E. 931, 68 Am. St. 85. Officer need not possess legal title to the office and he may be either de jure or de facto an officer. But an incumbent of an office created by an unconstitutional statute cannot be guilty of extortion. Kirby v. S., 57 N. J. L. 320, 31 A. 213. One who obtains money by falsely representing he is an officer is guilty of obtaining money by false pretenses, not of extortion. Drake v. S., 2 Okla. Cr. 643, 103 P. 878.

95. Ib., § 390 et seq.

96. S. v. Brown, 12 Minn. 490; Territory v. McElroy, 1 Mont. 86.

2. "Did," etc., setting out the individual transaction so fully and accurately as to

3. Show the demanding or taking of a fee, and what fee,—"did extort receive, and take," etc.; its excess above the legal sum, wherein, therefore, the sum which he had earned, if any, should appear; or the fact of no fee having been earned, or the services having been of a sort for which the law provides none; or the legal time for payment not having yet arrived.

4. Charge that this was done "unlawfully, corruptly, deceitfully, extorsively, and by color of his said office," or words to the like effect.[97]

§ 358. 1. **"Extort"—"Color of Office."**—Both of these terms appear to be, under the common law, indispensable.[98]

2. **"Wilfully,"**—found in some of the forms, may be omitted,[99] unless the indictment is on a statute employing it.[1]

3. **Due or not.**—If no fee was earned, or by law provided, the indictment must say so. If a fee was due, it must state

It is necessary to allege and prove official capacity. Drake v. S., 2 Okla. Cr. 643, 103 P. 878. To demand and receive fees before they are due is extortion at common law. S. v. Cooper, 120 Tenn. 549, 113 S. W. 1048. An indictment against a toll-collector is not sustained by proof that he was a deputy sheriff. S. v. Bisaner, 97 N. C. 503, 2 S. E. 368.

97. See precedents., Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 581 (19th Ed.) 891; 3 Chit. Crim. Law, 293-301; S. v. Burton, 3 Ind. 93; Rex v. Broughton, Trem. P. C. 111; Rex v. Johnson, Trem. P. C. 119; Rex v. Newman, Trem. P. C. 123; Dean v. S., 9 Ga. 303, 71 S. E. 597. The evidence must show the excessive fees were for real or pretended services, and were demanded from some one who was under an obligation to pay. S. v. Wainwright, 50 Wash. 225, 228, 97 P. 51.

98. Train & Heard Prec. 203; P. v. Whaley, 6 Cow. 661. And see Reg. v. Tiddeman, 4 Cox, C. C. 387, 389; Leeman v. S., 35 Ark. 438, 37 Am. R. 44. In U. S. v. Williams, 76 F. 223. "Under color of office" was held insufficient where a statute forbade taking a fee "for the performance of any duty." In Pennsylvania indictment need not contain "extort," or "extorsively." Com. v. Brown, 23 Pa. Super. Ct. 470.

99. S. v. Cansler, 75 N. C. 442. "Corruptly." As to, see Reg. v. Tisdale, 20 U. C. Q. B. 272.

1. And see S. v. Packard, 4 Ore. 157. See, as to willfulness and corrupt intent. Vogel v. Brown, 201 Mass. 261, 87 N. E. 686.

how much and for what services. If not yet payable, that fact must appear. And the sum extorsively taken must be stated.[2] Thus,—

§ 359. **Under this Head,**—it suffices to say, for example, that the defendant, as constable, travelled four miles to serve an execution, for which travel he was entitled as mileage to sixteen cents; that corruptly, etc., he extorted thirty-two cents for said mileage, whereas but sixteen were due, etc.[3] Again,—

§ 360. 1. **For taking more than Due on an Execution,**—the indictment, it has been held, must set out the recital therein of the judgment on which it was issued, and the names of the parties thereto. "These averments," said Dewey, J. "were necessary in order to enable the party accused to defend himself against a second prosecution for the same offense." And—

2. **The Sum due on the Execution**—thus appearing, and being alleged thus descriptively,[4] must be proved as laid.[5] But—

§ 361. **The Sum charged as taken**—extorsively by the defendant it not, in this sense, descriptive; and though a sum must be stated in allegation,[6] any other which will show the offense[7] will suffice in proof. An averment, for example, that twenty shillings were got extorsively, will be sustained by proof of one shilling.[8]

§ 362. **Summary of Doctrine.**—In Burn's Justice, tit. Extortion, the doctrine is epitomized, thus:—

2. Halsey v. S., 1 Southard, 324; S. v. Coggswell, 3 Blackf. 54; Reg. v. Tracy, 6 Mod. 30; P. v. Rust, 1 Caines, 133; S. v. Perham, 4 Ore. 188; S. v. Packard, 4 Ore. 157; S. v. Maires, 4 Vroom, 142; S. v. Brown, 12 Minn. 490; Oliveira v. S., 45 Ga. 555. And see S. v. Smythe, 33 Tex. 546, post, § 362.

3. Emory v. S., 6 Blackf. 106.

4. Vol. II, § 488.

5. Seany v. S., 6 Blackf. 403, 404.

6. Ante, § 358 (3); Hanley v. S., 125 Wis. 396, 104 N. W. 57.

7. Vol. II, § 488b (2).

8. Rex v. Burdett, 1 Ld. Raym. 148, 149; Spence v. Thompson, 11 Ala. 746; Rex v. Gillham, 6 T. R. 265, 267.

1. **Joinder of Defendants.**—"Several defendants may be jointly indicted when no fee was due.[9]

2. **Time.**—"The time of the offense must be alleged.[10]

3. **Pretense.**—"If the indictment charge that the defendant, as bailiff of a hundred, under color of office, took a sum of money, without showing more particularly by what pretence it was taken, it will be good, at least after verdict; for perhaps he might claim it generally as being due to him as bailiff, in which case the demand could not be otherwise stated.[11]

4. **Nothing due—Something.**—"Where nothing was due, that fact ought to be averred; and where anything was due, the sum which might have been lawfully taken must be expressed."[12]

§ 363. **Ownership**—of the thing taken by extortion may be laid in a county by name, when the proof is so.[13]

§ 364. 1. **If on a Statute,**—the indictment must conform to its terms.[14] Thus,—

2. **"Knowingly."**—If the expression is "*knowingly takes,*"[14a] a *scienter* must be alleged. And—

9. Reg. v. Atkinson, 2 Ld. Raym. 1248. 1 Salk. 382; Lake's Case, 3 Leon. 268; Com. Dig. Extortion, C.; East India Company v. Atkins, 1 Stra. 168, 175; s. c. nom. East India Company v. Atkins, 1 comyns, 347.

10. Rex v. Roberts, 4 Mod. 101, 103, 3 Salk. 198.

11. Rex v. Cover, 1 Sid. 91. The extortion may be laid generally, "by color of his offices," without specifying that the defendant took the money as fees, or to his own use. P. v. Whaley, 6 Cow. 661. Compare, with this case, S. v. Stotts, 5 Blackf. 460. And see Rex v. Robe, 2 Stra. 999; Reg. v. Tracy, 6 Mod. 30.

12. Lake's Case, 3 Leon, 268; Com. Dig. Extortion C. See ante, § 358 (3).

13. S. v. Moore, 1 Ind. 548.

14. Territory v. McElroy, 1 Mont. 86; Oliveira v. S., 45 Ga. 555; McCarthy v. Territory, 1 Wy. 311; U. S. v. Jackson, 3 Saw. 59; Smith v. S., 10 Tex. Ap. 413; Ferkel v. P. 16 Bradw. 310. And see S. v. Crowley, 10 Vroom, 264; Mann v. S., 47 Ohio St. 556, 26 N. E. 226; Culbertson v. Kinevan, 78 Cal. 68, 14 P. 364; Dean v. S., 9 Ga. 303, 71 S. E. 597; S. v. Wainwright, 50 Wash. 225, 97 P. 51.

14a. Crawford v. Joslin, 83 Vt. 361, 76 A. 108.

3. **Proof of Knowledge.**—If, while some items are overcharged, proof that the amount taken was less than the law allows will strongly tend to establish the defendant's honesty of purpose.[15] Other extortions cannot be shown.[16]

15. Cleaveland v. S., 34 Ala. 254. And see Spence v. Thompson, 11 Ala. 746.

16. C. v. Saulsbury, 152 Pa. 554, 25 A. 610; Cleaveland v. S., 34 Ala. 254, 259; Com. v. Shed, 1 Mass. 227; Cutter v. S., 36 N. J. L. 125, 127; P. v. Whaley, 6 Cow. (N. Y.) 661; S. v. Pritchard, 107 N. Car. 921, 927, 12 S. E. 50. As a general proposition the extortion must be done knowingly and with a corrupt intent and not merely by an accidental over charge. S. v. Hanna, 99 Me. 224, 228, 58 A. 1061; See also, as to knowledge. Lane v. S., 47 N. J. L. 362, 1 A. 476.

CHAPTER CXX.

FALSE IMPRISONMENT.

Consult—for the law of this offense, and the kindred Kidnapping, New Crim. Law, II, §§746-755a. For the indictment, etc., Dir. & F., §§ 568-572. And for miscellaneous questions see the indexes to this series of books.

§ 365. 1. **Assault.**—It is permissible[17] and convenient to charge an assault with the false imprisonment; so that, should the evidence sustain the former but not the latter, the defendant may be convicted without a fresh indictment.

2. **The Indictment**—alleges that on, etc., at, etc., the defendant "did," etc., setting out an assault and battery on X; "and," by Archbold's form, "him the said X then and there unlawfully and injuriously and against the will of the said X, and also against the laws of this realm, and without any legal warrant, authority, or reasonable or justifiable cause whatsoever, did imprison, and detained so imprisoned there for a long space of time, to wit, for the space of ten hours then next following, and (where the fact is so) until he the said X had paid to the said [defendant] the sum of five pounds and five shillings, of the moneys of the said X, for his enlargement."[18]

§ 366. **Assault omitted.**—Though the approved precedents charge an assault, still, it false imprisonment does not necessarily include it,[19] the indictment will plainly be good without the allegation. Perhaps it will be good also if false imprisonment does include assault.[20]

17. Vol. I, § 438 (3); New Crim. Law, II, §§ 56-747. See ante, §§ 63 64.

18. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 470, 19th Ed. 751; 3 Chit. Crim. Law, 835. For the form abbreviated, see Archb. New Crim. Pro. 393. And compare with Dir. & F. § 569. For other forms, see 3 Chit. Crim. Law, 835, 840. See Scomer v. P., 25 Ill., 70, 76 Am. Dec. 786.

19. New Crim. Law, II, § 747.

20. And see Herring v. S., 3 Tex. Ap. 108.

§ 367. 1. **On Statute**[20a]—A Texas statute defines false imprisonment to be "the wilful detention of another against his consent, and when it is not expressly authorized by law." In Florida the words are, "whoever, without lawful authority, forcibly or secretly confines or imprisons another person within this State against his will," shall, etc. And under each statute the courts require the indictment to negative the authority.[21]

2. **At Common Law**—also, the learned Texas judge added: "It was so." [22] And the above form from Archbold [23] has such negative. But—

3. **"Unlawfully."**—It has been adjudged adequate to say "unlawfully and feloniously imprisoned," not adding "without legal authority;" for the former includes the latter.[24] Still,—

§ 368. 1. **In Matter of Evidence,**—if the imprisonment is proved, its unlawfulness will *prima facie* be presumed.[25] But authority may be shown by the defendant in justification, or it will be equally effectual if it apears among the proofs against him.[26]

20 a. As to Wisconsin statute see 72 Wis. 54, 38 N. W. 722.

21. Redfield v. S., 24 Tex. 133; Barber v. S., 13 Fla. 675; Waterman v. S., 13 Fla. 683. And see the Texas cases of Herring v. S., 3 Tex. Ap. 108; Woods v. S., 3 Tex. Ap. 204; McClure v. S., 26 Tex. Ap. 102. **Intent.**—Under the Florida statute it must be added, to cover terms not stated in the text, "with intent either to cause him to be secretly confined or imprisoned in this State against his will, or to cause him to be sent out of this State," etc., Ross v. S., 15 Fla. 55; "without lawful authority" held essential, Barber v. S., 13 Fla. 675; Waterman v. S., 13 Fla. 683; "unlawfully and feloniously imprisoned" held sufficient. U. S. v. Lapointe, 1 Morris (Iowa), 146.

22. Redfield v. S., supra. Accused, a private person, cannot defend upon the grounds that he had reasonable grounds for believing a certain offense was a felony as ignorance of the law is no excuse. Begley v. Com., 22 Ky. L. 1546, 60 S. W. 847.

23. Ante, § 365 (2).

24. U. S. v. Lapoint, Morris, 146.

25. Archb. New Crim. Pro. 293; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 471; Floyd v. S., 7 Eng. 43, 54 Am. Dec. 250; Kirbie v. S., 5 Tex. Ap. 60; Mitchell v. S., 7 Eng. 50, 54 Am. D. 253.

26. S. v. James, 78 N. C. 455; Floyd v. S., 7 Eng. 43, 54 Am. D

2. **Variance.**—A detention alleged as by threats is not proved by one by assault.[27]

3. **The Jury,**—where the testimony is conflicting, determines from it whether or not the party was imprisoned.[28]

250; Coats v. Darby, 2 Comst. 517. And see Phillips v. Trull, 11 Johns. 486; Griswold v. Sedgwick, 1 Wend. 126; Wait v. Green, 6 Par. Cr. 185; Wood v. Kinsman, 5 Vt. 588; Grenville v. College of Physicians, 12 Mod. 386, 387; Kendall v. Powers, 4 Met. 553; Stone v. Dana, 5 Met. 98; McCully v. Malcom, 9 Humph. 187.

27. Maner v. S., 8 Tex. Ap. 361. See also Harkins v. S., 6 Tex. Ap. 452.

28. Floyd v. S., supra.

For False News, see New Crim. Law, I, §§ 472-478; Dir. & F., § 310; False Personation, see False Pretenses; False Pretenses, see Cheats and False Pretenses; False Tokens, see Cheats and False Pretenses; False Toll-Dish, keeping, see Stat. Crimes; Dir. & F., §§ 981, 982; Faro Bank, exhibiting, see Stat. Crimes; Ferry, see Way; Fight, Prize, see ante, § 24 (2) and note.

CHAPTER CXXI.

FORCIBLE ENTRY AND DETAINER.

Consult—for the law of this offense, New Crim. Law, II, §§ 489-516. For the indictment, etc., Dir. & F., §§ 441-448. And for miscellaneous questions, see the indexes to this series of books. See also FORCIBLE TRESPASS, and TRESPASS TO LANDS, Dir. & F., §§ 990-995.

§ 369. **Complex**—is the law of this offense. For the ancient common law is blended with early English legislation; yet what statutes were accepted as common law with us it would be difficult completely to define, nor would the result be quite the same in all our States.[29] And this mixed mass of old law is variously modified and superseded in our different States. Hence arise difficulties in these explanations of the procedure. To disentangle the subject as far as may be,—

§ 370. **How Chapter divided.**—We shall consider how the procedure is, I. Under the English Common Law; II. Under Old English Statutes; III. The Modern Procedure with Us.

I. *Under the English Common Law.*

§ 371. **As to Indictment.**—Because this offense under the old common law is not perfectly defined,[30] and from early

29. New Crim. Law, II, §§ 492, 496.

30. New Crim. Law, II, § 490; 1 Russ. Crimes, 5th Eng. Ed. 404. Forcible entry is a misdemeanor under a statute providing for offenses recognized at law common law. Ex parte Webb, 24 Nev. 238, 51 P. 1027. To constitute forcible entry under a statute, entry must be accompanied by an act of violence. Lewis S., 99 Ga. 692, 59 Am. St. 255, 26 S. E. 496. Person in possession need not resist to such an

periods the indictment was on the old English or the modern statutes, the form for it is not quite settled by adjudication. In the old books, the offense is sometimes associated with riot; and many of the precedents charge it substantially as such, setting out the entry or detainer upon the land as the central act.[31] But this allegation of riot is unnecessary; yet, in its absence, more of force must be averred than constitutes a mere civil trespass. The old phrase "with force and arms"[32] is appropriate in this offense if in any, and doubtless at one time it was essential. But it was never alone sufficiently expressive of the force. The better form of words, held adequate, is that the entry, for example, was "with strong hand."[33] Yet they are not so technical that they may not be supplied by others.[34]

§ 372. **A Form for the Indictment,**—leaving out of view the charging of the offense essentially as riot, may be, for a forcibly entry, that on, etc., at, etc., the defendants, A, B, and C, unlawfully, injuriously, and with a strong hand entered into a certain orchard ground and barn thereon in the possession and occupancy of X and him the said X then and there unlawfully, injuriously, and with a strong hand, from the said possession and occupancy of the said premises, expelled and put out, and kept him out, and still keep him out.[35]

extent that he is actually assaulted. Williams v. S., 120 Ga. 488, 48 S. E. 149; compare, S. v. Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. 844.

31. Rex v. Hampson, Trem. P. C. 191; 2 Chit. Crim. Law, 1136 b.

32. Vol. II, § 502 (1). Marmaduke v. P., 45 Colo. 357, 101 P. 337.

33. Post, § 380; Rex v. Wilson, 8 T. R. 357; Rex v. Storr 3 Bur. 1698; Rex v. Bake, 3 Bur. 1731; Rex v. Atkyns, 3 Bur. 1706; S. v. Leathers, 31 Ark. 44; Com. v. Sattuck, 4 Cush. (Mass.), 141.

34. Post, § 379; Reg. v. Dyer, 6 Mod. 96; Rex v. Bathurst, Say. 225; C. v. Taylor, 5 Binn. 277.

35. Compare with Dir. & F., §§ 442, 443, and with the last section, and ante, § 16; 2 Burn. Just. Forcible Entry and Detainer, 28th Ed. p. 908; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 603; Matthews Crim. Law, 475; Rex v. Wilson, 8 T. R. 357; Rex v. Bake, 3 Bur. 1731; Rex v. Holmes, 1 Mod. 73; Rex v. Bathurst, Say. 225; C. v. Shattuck, 4 Cush. 141; C. v. Taylor, 5 Binn. 277; S. v. Tolever, 5 Ire. 452; S. v. Morgan, Winst. 1. 246; C. v. Jackson, 1 Grant, Pa. 262.

§ 373.. 1 **Estate and Possession.**—"It is not necessary," says Archbold, "to set forth or prove the particulars of the prosecutor's estate in the messuage, etc., because in this case there is no restitution; stating that X was possessed, and proving his possession, will be sufficient." [36] But his name must be alleged and proved, if known.[37] And to aver the possession under a *quod cum*—"for that whereas" he was possessed—is, though not the usual form, adequate.[38] To lay it in a married woman, not separated from her husband, is ill.[39]

2. **An Expulsion and Detainer,**—Archbold well suggests, need not be proved, "unless where the prosecutor has failed to prove the entry to have been forcible." [40] For the offense is evidently complete when the ill conduct has gone far enough to constitute the breach of the peace which this proceeding is to correct.[41]

II. *Under Old English Statutes.*

§ 374. **The Statute of 5 Rich. 2, stat. 1, c. 8,**—fully given in "New Criminal Law," [42] in substance merely affirmed the common law, not as to detainers, but simply as to en-

36. Archb. Crim. Pl. & Ev. (19th Ed.) 910; S. Speirin, 1 Dev. 119; Rex v. Wilson, 8 T. R. 357; Reg. v. Soley, 11 Mod. 115; Harding's Case, 1 Greenl. 22, Post, § 386; New Crim. Law, II, § 501.

37. Reg. v. Soley, supra.

38. Rex v. Holmes, 1 Mod. 73. See Rex v. Knight, 3 Salk. 186.

39. C. v. Kensey, 2 Parsons, 401.

40. Archb. ut sup. "If, at the time the effort to re-enter is made there be an exhibition, by words, acts or circumstances, calculated to intimidate the former possessor, and to impress on him an intention on the part of the person unlawfully detaining the premises to hold possession of them by force and violence, the offense is complete. Ellis v. S., 124 Ga. 91, 94, 52 S. E. 147. As to necessity for force under Missouri Statute. S. v. Glenn, 130 Mo. Ap. 145, 108 S. W. 1073.

41. New Crim. Law, II, § 490, 504, 505; Anonymous, 3 Salk. 187; C. v. Taylor, 5 Binn. 277; S. v. Tolever, 5 Ire. 452. Actual violence need not be alleged or proved. A breach of the peace, or i. e. menaces, threats and intimidation is enough. Williams v. S., 120 Ga. 488, 489, 48 S. E. 149; following Blackwell v. S., 74 Ga. 816.

42. New Crim. Law, II, § 492 (2).

tries, not upon every sort of property as at common law, but upon "lands and tenements." The indictment required slight changes to conform to the statutory terms; but except as to these, it was the same as at common law.[43]

§ 375. 1. **Restitution of the Premises**—was by subsequent statutes provided for on the proceeding for forcible entry.[44] And 21 Jac. 1, c. 15, extended these statutes "unto tenants for term of years, tenants by copy of court-roll, guardians by knights' service, tenants by *elegit,* statute-merchant, and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force."

2. **How describe for Restitution.**—Where restitution of lands is sought through this proceeding, they "must," says Archbold, "be described with the same certainty as in a declaration in ejectment." And he adds, if the estate "were not a fee simple, but an estate in tail, or for life merely, describe it as such."[45]

§ 376. **The Indictment**—appears to be the same where restitution is to be asked, as is the statutory one where it is not, except that this fuller designation of the premises and of the prior possessor's estate therein is required only in the former case. For a leasehold, under 21 Jac. 1, c. 15, this part of the allegation may be that A, of, etc., "was possessed of a certain messuage with the appurtenances, there situate and being, for a certain term of years, whereof divers, to wit, ten years, were then to come, and are still unexpired," and being so possessed, etc.[46]

§ 377. **On the Forcible Detainer Statutes,**—as, 8 Hen. 6, c. 9,[47] or 21 Jac. 1, c. 15,[48]—the indictment, after stating the premises, and an unlawful entry by the defendant into

43. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 600; 2 Chit. Crim. Law, 1136 b.

44. New Crim. Law, II, §§ 494-496.

45. Archb. Crim. Pl. & Ev. (19th Ed.) 907, referring to Reg. v. Bowser, 8 Dowl. P. C. 128; post, § 382.

46. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 602, (19th Ed.) 909.

47. New Crim. Law, II, §§ 494-496.

48. Ante, § 375 (1).

them, or whatever else is necessary to render the detainer indictable,[49] may proceed to aver that from, etc., until the day of the finding of the indictment, the defendant, from the possession of the said premises, did, with a strong hand, unlawfully and injuriously keep out the lawful possessor named, and did then and there unlawfully and forcibly and with a strong hand hold said premises from him, and still does so hold the same.[50]

III. *The Modern Procedure with Us.*

§ 378. 1. **The Common law Indictment,**—of our first sub-title,[51] is available in any State having common law crimes, if not expressly or by implication abolished or modified by statute,[52] So,—

2. **On Old English Statutes,**—accepted as common law in the particular State, the indictment may be equally founded. Again,—

3. **State Statutes,**—in nearly all the States, provide a summary proceeding for regaining possession,—generally civil in its nature and form. The mere civil remedy is not for consideration here. But in a part of the States the statutes are also criminal.[53]

49. See, for illustration, Fitz-William's Case, Cro. Eliz. 915; Rex v. Oakley, 4 B. & Ad. 307, 1 Nev. & M. 58; Rex v. Wilson, 3 A. & E. 817, 6 Nev. & M. 625; P. v. Carter, 29 Barb. 208; P. v. Fields, 1 Lans. 222; Thorn v. Reed, 1 Pike, 480; Floyd v. Ricks, 6 Eng. 451.

50. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 602; 3 Chit. Crim. Law, 1136b; S. v. Harvey, 3 N. H. 65.

51. Ante, §§ 371-373.

52. Cruiser v. S., 3 Harrison, 206; C. v. Shattuck, 4 Cush. 141; S. v. Walker, 5 Sneed, 259. For other forms, see C. v. Jackson, 1 Grant (Pa.), 262, 4 Went. Pl. 149.

53. Dotson v. S., 6 Coldw. 545; Wood v. Phillips, 43 N. Y. 152; Hyatt v. Wood, 4 Johns. 150, 4 Am. D. 258; P. v. Runkel, 9 Johns. 147; S. v. Walker, 5 Sneed, 259; Helm v. Slader, 1 A. K. Mar. 320; Norton v. Sanders, 7 J. J. Mar. 12; Jones v. Com., 31 Ky. L. 1148, 104 S. W. 782. A statute which punishes forcible entry or detention "of any lands or possessions of another," punishes a forcible entry on a possessory interest or right. The statute restrains the owner of land from forcibly ejecting a tenant without process. Foust v. Ter., 8 Okla. 541, 58 P. 728.

4. **In this Sub-title,**—not descending into the details of the criminal statutes, we shall take a view of a few questions liable to arise in the various forms of procedure; partly repeating, and enlarging upon, some already mentioned in this chapter.

§ 379. First. *The Allegation of the Force*:—

1. **A Form of Charging the Force,** [53a]—held good, was that on, etc., at, etc., the defendant "with an axe and auger, unlawfully, violently, forcibly, injuriously, and with a strong hand, did enter the dwelling-house of" X, occupied by him and family, bored into the house, did to it other specified damage, and put the inmates "in fear of their lives." [54]

2. **"With Strong Hand,"**—we have seen,[55] may be supplied by other words. And an allegation not very dissimilar to the above, with this omission, where the entry was into a dwelling-house to the great disturbance of the persons within, was adjudged good.[56] The distinction, not inquiring now how important it is,[57] should be borne in mind, that the place in these instances was a—

§ 380. 1. **Dwelling-house.**—In reason,[58] and, said Lord Kenyon, "in the cases cited, a distinction seems to have been taken between a forcible entry into a dwelling-house and a forcible entry into other kinds of property, and it has

53a. To be forcible the entry must be accompanied by some actual violence or terror against him in possession. Menaces, as well as force of arms will be enough. A mere trespass or illegal entry is not enough alone. There must be an act accompanying the entry which will constitute a breach of the peace, consisting either of an array of force threatening violence, or of actual violence calculated to intimidate. Lewis v. S., 99 Ga. 692, 694, 26 S. E. 496, 59 Am. St. 255; S. v. Leary, 136 N. C. 578, 48 S. E. 570; S. v. Pollok, 26 N. C. 305, 42 Am. Dec. 140; S. v. Jacobs, 94 N. C. 950. So an entry becomes forcible by being forbidden by one having a right to forbid it. S. v. Robbins, 123 N. C. 730, 738, 31 S. E. 669; S. v. Webster, 121 N. C. 586.

54. Harding's Case, 1 Greenl. 22.

55. Ante, § 371.

56. C. v. Taylor, 5 Binn. 277. And see S. v. Tolever, 5 Ire. 452.

57. New Crim. Law, II, § 499; S. v. Morgan, Winst. 1, 246.

58. See New Crim. Law, II, §§ 497-499.

been said that a less degree of force need appear in an indictment in the former case than in the latter."[59] But even where the entry is into the dwelling, it will not suffice simply to say "with force and arms."[60] Still—

2. **Even upon Premises other than the Dwelling-house,**—the allegation of force in the entry need, we have seen,[61] be only that it was "with a strong hand;"[62] while yet these particular words are not essential,[63] though the force necessary under the special facts must in some way appear in averment.[64]

3. **On Statute.**—The words of the old English statutes were "*manu forti,*" with a strong hand; hence an indictment on them, not containing these words, was ill.[65]

§ 381. Secondly. *The Description of the Premises:*—

No Restitution.—By the common law rules, under statutes prescribing a punishment but not restitution of the premises to the rightful possessor, no description of them other than a general designation, with the name of the person occupying or entitled to the same,[66] is necessary;[67] unless, as is sometimes provided where they are to be restored,[68] but seldom or never otherwise, more should be required by a statute.

§ 382. 1. **If the Court may order Restitution,**—the indictment should enable it to instruct its officer where to find and how to identify the premises to be restored.[69] Hence the rule for the description is, we have seen, that it shall

59. Rex v. Wilson, 8 T. R. 357, 360.

60. Ante, § 371.

61. Ante, § 371.

62. C. v. Shattuck, 4 Cush. 141; S. v. Whitfield, 8 Ire. 315.

63. Rex v. Bathurst, Say. 225, 227; Reg. v. Dyer, 6 Mod. 96.

64. Rex v. Bake, 3 Bur. 1731. See, Lewis v. S., 99 Ga. 692, 695, 26 S. E. 496, where the matter is discussed.

65. Rex v. Baker, 11 Mod. 235; Warner's Case, Cro. Eliz. 461*. Compare with McEvoy v. Igo, 27 Cal. 375; Owen v. Doty, 27 Cal. 502; Jarvis v. Hamilton, 16 Wis. 574.

66. Ante, §§ 372, 374.

67. S. v. Warren, 13 Tex. 45. Strong v. S., 105 Ind. 1, 4 N. E. 293; Peele v. S., 161 Ind. 378, 68 N. E. 682.

68. Lewis v. Steele, 1 Minn. 88.

69. Bickley v. Norris, 2 Brev. 252.

be the same as in an action of ejectment.[70] Within this rule, the words "a certain close of two acres of erable land, situate in Shirley township in the county aforesaid, being part of a large tract of land adjoining lands of Andrew Dimond and Henry Hoshell," were held to be adequate; Tilghman, C. J. observing: "It is said that the sheriff will not know the land of which he is to make restitution. Perhaps he will not, until it is shown to him; for it is difficult to give such a description in writing as would enable a man to find out the spot without assistance. The same difficulty often occurs in ejectments. . . . In both, the sheriff receives information from the party who is to receive possession; and in both, the court, who heard the evidence, will superintend the execution and guard against injustice."[71] While this may be so in strict law, a prudent pleader will practically make the description more minute and exact.[72]

70. Ante, § 375 (2); Dean v. C., 3 S. & R. 418, 419, 420. Certainty to a reasonable extent only is required in the description. Torrence v. C., 9 Pa. 184.

71. Dean v. C., supra.

72. The following cases may be helpful; A description not giving the number of acres, etc., may be good. Humphreys' Case, Cro. Eliz. 458*; McNair v. Rempublicam, 4 Yeates, 326. The statutory demarcations of range, township, and section are not essential; the metes and bounds, and objects of notoriety in the neighborhood, will suffice. Mead v. Daniel, 2 Port. 86. "A certain messuage, with the appurtenances, for a term of years, in the district of Spartenburg" was too indefinite. S. v. Walker, 2 Brev. 255. But the following was sustained: "A certain dwelling-house and woolen factory, or wool-carding and cloth-dressing mill or machine, and also a saw-mill, said dwelling house situated on," etc., giving the boundaries at length; "also, said woolen factory, or wool-carding and cloth-dressing mill or machine, being situated," etc., giving the boundaries; "also, said saw-mill, being situated," etc., setting out the boundaries,—"all of which is situated upon lands of J. I. J., in D township, Tioga county, Pennsylvania." C. v. Jackson, 1 Grant (Pa.), 262. So was the following: "A certain messuage and tract of land, situated in the township and county aforesaid, and described as follows,—All that piece of land containing seventy-six acres and one hundred and fifty perches, and the allowance of six per cent, it being a part of a large tract, known as the Peter Jackson improvement, adjoining lands of David Henderson on the east. Vanpool v. C., 13 Pa. 391. See also Clements v. Clinton, Mart. & Yerg. 198; Moore v. Massie, 3 Litt. 296; Ward v. Lewis, 1 Stew. 26; House v. Camp, 32 Ala. 541; Castro v. Gill,

2. **Prove as laid.**—The description of the premises to be restored must be proved at the trial as laid.[73] Yet in the civil proceeding a separable part only may be shown,[74] and probably it is the same in the criminal.[75]

§ 383. Thirdly. *The Estate of the Person dispossessed:*—

Where Restitution is to be asked,—we have seen[76] that the books require the indictment to set out the estate claimed by him to whom it is to be made.[77] Yet in law, this proceeding settles nothing as to the title;[78] hence, if this consideration stood alone, the estate claimed need not be averred. But under the old English statutes, and under some of our modern ones, not every sort of possessory right justifies this proceeding; then, of course, the indictment must affirmatively show a right to which the statute is applicable, otherwise no jurisdiction over the case appears. Consequently, in South Carolina, an inquisition under 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15, entitling the ousted person to restitution, must, it is held, aver what estate he had, so that it may appear whether he is within the statutes, which he is not if he is tenant at will or by sufferance; and where the allegation was merely that the prosecutor "was seised and possessed" of the premises "for a term of time," without saying for what time, whether for life or years, or whether it was still subsisting, judgment was arrested.[79]

5 Cal. 40; Paul v. Silver, 16 Cal. 73; Moore v. Massie, 3 Litt. 296; Applegate v. Applegate, 1 Harrison, 321; Allen v. Gibson, 4 Rand. 468; Gorman v. Steed, 1 W. Va. 1.

73. Ball v. S., 26 Ind. 155.

74. Atchley v. Latham, A. K. Mar. 164; Jarvis v. Hamilton, 19 Wis. 187.

75. And see post, § 388.

76. New Crim Law, II, § 501 (3); ante, § 375 (2).

77. Taylor v. Griffith, 7 Mod. 115; Reg. v. Depuke, 11 Mod. 273; Reg. v. Griffith, 3 Salk. 169; Rex v. Wannop, Say. 142; Ward v. Lewis, 1 Stew. 26; Reg. v. Taylor, 7 Mod. 123; P. v. Nelson, 13 Johns. 340; Torrence v. C., 9 Pa. 184; Respublica v. Campbell, 1 Dall. 354; Clements v. Clinton, Mart. & Yerg. 198.

78. P. v. Leonard, 11 Johns. 504; Beeler v. Caldwell, 33 Mo. 84; Dedman v. Smith, 2 A. K. Mar. 260; Smith v. Dedman, 4 Bibb, 192.

79. S. v. Speirin, 1 Brev. 119. See also Rex v. Holmes, 1 Mod. 73; Rex v. Dillon, 2 Chit. 314; S. v.

Hence, with us, on principle, and perhaps on authority, the indictment should be required to set out the estate, or not, according to the terms of the statute.[80]

§ 384. **In Proof,**—the seisin alleged is presumed from possession,—a presumption which may be rebutted.[81] So also, it seems, is the alleged fact that the person ousted is lessee for years.[82]

§ 385. **Nature of Estate.**—"It is immaterial," says Archbold,[83] "whether the estate thus proved be an estate by right or by wrong; for, even if the defendant have a right of entry, still his asserting that right 'with strong hand or with multitude of people, is equally an offense within the statute as if he had no right. The statute, however, does not extend to a case where the party ousted had the bare custody of the premises for the defendant; but it extends to the forcible ouster of one joint tenant, or tenant in common, by

Butler, Taylor, 262. In England, the averment that the defendants into one messuage, etc., in the possession of X, he the said X then and there being also seised thereof, with force of arms, etc., did enter, and the said X from the peaceable possession with force and arms, etc., did put out, was held, after verdict, to show such present seisin of X as would authorize the awarding of restitution. Rex v. Hoare, 6 M. & S. 266. And see Respublica v. Shryber, 1 Dall. 68.

80. P. v. Leonard, supra; P. v. Reed, 11 Wend. 157; P. v. Van Nostrand, 9 Wend. 50; P. v. Carter, 29 Barb. 208; S. v. Butler, Conference, 331; McNair v. Rempublicam, 4 Yeates, 326; Rhodes v. Comer, 2 Sneed, 40; Eastman v. White, 3 Ghand. 196; Whittaker v. Gautier, 3 Gilman, 443; Beel v. Pierce, 11 Ill. 92; Woodman v. Ranger, 30 Me. 180; Bush v. Dunham, 4 Mich. 339; Bryan v. Smith, 10 Mich. 229; Ellis v. Murray, 28 Miss. 129; S. v. Pearson, 2 N. H. 550; Wall v. Hunt, 4 Halst. 37; Banks v. Murray, 2 Southard, 849; Allen v. Smith, 7 Halst. 199; Drake v. Newton, 3 Zab. 111; Dutton v. Tracey, 4 Conn. 79; Fortier v. Ballance, 5 Gilman, 41; Brooks v. Bruyn, 18 Ill. 539; Phillips v. Sampson, 2 Head, 429; S. v. Bennett, 4 Dev. & Bat. 43; Barnes v. Nicholson, 1 Penning, 326.

81. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 600; P. v. Leonard, 11 Johns. 504; P. v. Van Nostrand, 9 Wend. 50. See Jayne v. Price, 5 Taunt. 326, 1 Marshall, 68; P. v. Nelson, 13 Johns. 340. "Rightful" possession need not be alleged or proved. Peelle v. S., 161 Ind. 378, 68 N. E. 682.

82. Rex v. Lloyd, Cald. 415.

83. Archb. et sup.

another."[84] Evidence of title in the defendant to the land is not admissible.[85]

§ 386. 1. **Where there is no Restitution,**—on a common law indictment, the possessor's estate need not be particularized. It is sufficient to aver that he was in quiet possession.[86] And so much, at least, must be alleged.[87] Then—

2. **The Proof**—need only establish the possession as thus set out.[88]

§ 387. Fourthly. *Remaining Questions*:—

1. **That the Defendant entered "as Servant"**—is not legally objectionable in allegation, but superfluous; it need not be added by whom commanded, for the command is not a justification or traversable.[89]

2. **Ousted.**—By some form of words, it should be alleged that the person entered upon was ousted.[90]

3. **Witness.**—In States where interest disqualifies a witness, one dispossessed by a forcible entry cannot testify

84. 1 Hawk. P. C. (6th Ed.), c. 64, §§ 32, 33.

85. Reg. v. Cokely, 13 U. C. Q. B. 521; P. v. Leonard, 11 Johns. 504. See Rex v. Williams, 9 B. & C. 549, 4 Man. & R. 471. If the case appears to be one of disputed title it should be dismissed. S. v. Thompson, 130 N. C. 680, 41 S. E. 486. But a possession based on mere sufferance is not sufficient to maintain forcible entry. S. v. Leary, 136 N. C. 578, 48 S. E. 570.

86. S. v. Speirin, 1 Brev. 119; ante, § 373 (1). And see Phelps v. Baldwin, 17 Conn. 209.

87. Corlies v. Corlies, 2 Harrison, 167; Singleton v. Finley, 1 Port. 144; Phelps v. Baldwin, supra. And see C. v. Bigelow, 3 Pick. 31; S. v. Bennett, 4 Dev. & Bat. 43; Burt v. S., 3 Brev. 413.

88. S. v. Wilson, 1 Ire. 32.

89. Rex v. Burgess, 2 Rawm. 84.

90. Rex v. Waite, 4 Mod. 248; Rex v. Dorny, Holt, 267, 1 Ld. Raym. 610.

"Expelled"—"Disseised." Where the entry is upon a tenant for years, the word should be "expelled," and not "disseised." Rex v. Waite, supra. But where the person entered upon has a freehold, "disseised" is the proper word. Reg. v. Griffith, 3 Salk. 169. The allegation that the prosecutor was disseised, necessarily implies a previous seisin. C. v. Fitch, 4 Dall. 212.

Where Inquisition. An indictment on 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15, need not show that the inquisition was taken at the place alleged to be forcibly entered; otherwise as to a conviction on 15 Rich. 2, c. 2. S. v. Speirin, 1 Brev. 119.

against the wrong-doer in any proceeding wherein he may have restitution.[91]

4. **A Verdict**—that the defendant "unlawfully and with a strong hand detained," does not also affirm the entry unlawful.[92]

§ 388. 1. **Duplicity.**—A count charging a forcible entry and forcible detainer has been adjudged not double.[93]

2. **A Conviction for a Separable Part**—of what is alleged, and an acquittal of the rest, where all is not proved, may be had as in other criminal cases.[94]

91. Rex v. Williams, 9 B. & C. 549, 4 Man. & R. 471; Rex v. Beaven, Ryan & Moody, N. P. 242.

92. S. v. Godsey, 13 Ire. 348. And see Sherrill v. Nations, 1 Ire. 325; Altree v. Moore, 1 Ore. 350; Boxley v. Collins, 4 Blackf. 320; Raymond v. Bell, 18 Conn. 81.

93. C. v. Miller, 107 Pac. 276.

94. C. v. Rogers, 1 S. & R. 124; P. v. Anthony, 4 Johns. 198; Swartzwelder v. U. S. Bank, 1 J. J. Mar. 38; S. v. Ward, 1 Jones, N. C. 290; ante, § 382 (2). An allegation of forcible entry on land in possession of owner, and on same premises in possession of tenants, in separate counts, is not double. S. v. Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. 841.

CHAPTER CXXII.

FORCIBLE TRESPASS.

Consult—for the law of this offense, New Crim. Law, II, §§ 517-520a; also I, §§ 536-539. For the indictment, etc., Dir. & F., §§ 449-452.

§ 389. 1. **In this Chapter,**—we shall consider the procedure for the offense treated of under the same title in "New Criminal Law."

2. **Statutory Trespasses on Land,**—and some sorts of what in these volumes is termed malicious mischief, occasionally denominated forcible trespass, are not for this place.

§ 390. 1. **The Common law Indictment**—does not greatly differ from that for forcible entry;[95] the breach of the peace being there about real estate, and here personal.[96] As to some of the averments,—

2. **"Against his Will."**—The North Carolina court deems that at common law it is not absolutely necessary to lay the taking of the goods as "against the will" of the possessor; yet if these words are not employed, others of line import must be.[97] Also,—

3. **Possession—Strong Hand.**—Actual possession of the thing should be averred; adding that the defendant, with a strong hand, took it, etc.[98] Again,—

§ 391. **Presence of Owner.**—It must be further alleged that the taking was in the presence of the owner, and from his actual possession. To say simply that it was from his possession is, therefore, doubly inadequate.[99]

§ 392. **Defendant's Knowledge—Breach of Peace.**—Where, in a Virginia case, the offense was perhaps not technically a forcible trespass, and the indictment was at

95. Ante, §§ 371, 372.

96. See, for forms. S. v. Armfield, 5 Ire. 207, 208; S. v. Mills, 2 Dev. 420.

97. S. v. Armfield, 5 Ire. 207.

98. S. v. Mills, 2 Dev. 420.

99. S. v. Watkins, 4 Humph. 256. And see S. v. Ray, 10 Ire. 39; S. v. Walker, 10 Ire. 234.

common law, an allegation that the defendant rescued from the sheriff's bailee goods which had been distrained for public dues, not adding that he knew in what right the sheriff held them, was, for lack of this averment, adjudged ill. So also was the mere charge that the taking of a horse was "with force and arms," and done "unlawfully and injuriously," because not describing the act as a breach of the peace.[1] Moreover,—

§ 393. **All the Elements.**—It was held inadequate, as not comprehending all the elements of an indictable offense, to say that on, etc., at, etc., the defendant, with force and arms, one chestnut sorrel mare, the property of John A. Park, did unlawfully and forcibly take from and out of the possession of the said John A. Park.[2]

§ 394. **On Statute.**—The indictment on the Virginia statute may omit the words "but not feloniously," because they are not a part of the description of the offense.[3] It must allege that the property taken by the defendant belonged to another, and that the taking was done "knowingly and wilfully without lawful authority," which are the statutory words.[4]

§ 395. 1. **Variance—(Deer—Deer Skin).**—A charge of taking forcibly a slain deer is not supported by evidence of thus taking a deer's skin, severed from its body.[5] And—

2. **Superfluous Averment of Presence.**—Where it was alleged that A was present forbidding the trespassers, and this was superfluous because the possession of himself and the presence of his family were sufficient, yet by special verdict he was found have been absent, the variance was adjudged fatal. Said Nash, J.: "The charge in the indictment, and that set forth in the special verdict, are distinct and several."[6]

1. C. v. Israel, 4 Leigh, 675.

2. S. v. Farnsworth, 10 Yerg. 261.

3. Dye v. C., 7 Grat. 662.

4. C. v. Israel, 4 Leigh, 675; C. v. Percavil, 4 Leigh, 686.

5. S. v. Hemphill, 4 Dev. & Bat. 109.

6. S. v. Walker, 10 Ire. 234, 236.

For Foreign Enlistment Act, see Neutrality Laws, New Crim. Law, I, §§ 481-485, and particularly § 482; Dir. & F., §§ 759, 760.

CHAPTER CXXIII.

FORESTALLING.

Consult—for the law of this offense, New Crim. Law, I, §§ 518-526; and compare with the title ENGROSSING.

§ 396. **Indictment.**—The following is an English form of the indictment for this offense:—

"That A, late, of, etc., in the county of, etc., on, etc., at the parish aforesaid, in the county aforesaid, unlawfully did buy and cause to be bought, of and from one X, three hundred pounds' weight of meat, for the sum of eight pounds six shillings, as he the said X then and there was coming towards London, to wit, to a certain market called Newgate Market, in London aforesaid, to sell the said meat, and before the same was brought into the said market where the same should be sold; in contempt of our said lady the queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the queen, her crown, and dignity."[7]

§ 397. **Under the Title Engrossing,**—in this volume, are observations and references to places in the books, useful to be consulted in the present connection.

7. Matthews Crim. Law, 476. 533; Rex v. Waddington, 1 East, And see 2 Chit. Crim. Law, 532, 143.

CHAPTER CXXIV.

FORGERY OF WRITINGS AND ITS KINDRED OFFENCES.

Consult—for the law of these offenses, New Crim. Law, II, §§ 521-612. For the indictment, etc., Dir. & F., §§ 453-480. And compare with the title Counterfeiting, etc. **For considerable numbers of miscellaneous questions, see the indexes to this series of books.**

§ 398. **How Chapter divided.**—We shall consider, I. In General of the Indictment; II. In General of the Evidence: III. The Indictment and Evidence in Particular Forms of Offending and of Law; IV. Questions of Practice.

I. *In General of the Indictment.*

§ 399. **Allied to Attempt—and Cheat.**—Forgery being in its origin and nature a cheat, attempted or accomplished,[8] the indictment for it is drawn in a general way after the principles explained under the titles "Attempt" and "Cheats." But being more illumined by adjudications than those offenses, we shall not here have much occasion to look into those titles.

§ 400. 1. **Allege and Prove.**—The essentials of forgery proper, to be alleged and proved, are three,—

(1) A writing in terms to be apparently of legal efficacy.[9]

8. New Crim. Law, I, § 572 and note; II, §§ 148, 157, 158, 168, 521.

9. New Crim. Law, II, §§ 523-571; P. v. Bellafont, 11 Cal. Ap. 492, 105 P. 426; Ter. v. Deland, 3 Okla. 373, 41 P. 618; King v. S., 43 Fla. 211, 31 So. 254; S. v. Van Auken, 98 Iowa, 674, 68 N. W. 454; S. v. Alexander, 113 La. 747, 37 So. 711; P. v. Dougherty, 246 Ill. 458, 92 N. E. 929.

(2) An evil intent, of the sort deemed in law fraudulent, in the mind of the defendant.[10]

(3) A false making of such writing.[11]

2. **In the Connected Offenses,**—as, the uttering and the like,—for the third of these elements is substituted a charge of the particular act which distinguishes the offense, and the defendant's knowledge that the paper is forged.[12]

§ 401. 1. The Indictment for Forgery Proper,—in its ordinary common law form, where an individual is the intended victim, avers that on, etc., at, etc., the defendant, contriving and intending to injure him[13] giving his name, did falsely and fraudulently [where the offense is felony, say feloniously] forge and counterfeit a certain writing on paper, purporting to be, etc., [for example, a last will and testament, etc.], the tenor whereof is as follows [setting out the writing *verbatim*], with intent to injure, impoverish, and defraud [*or* cheat and defraud] the said, etc.,[14]

2. **For the Connected Offenses**—the indictments set out the forged instrument *verbatim*, the defendant's knowledge that it is spurious, his criminal intent, and the act distinguishing the particular form of offense.[15]

10. Ib., §§ 596-601; S. v. Bjornaas, 88 Minn. 301, 42 N. W. 980; S. v. Wolf, 122 N. C. 1079, 29 S. E. 841; Barnes v. Com., 101 Ky. 556, 41 S. W. 772; Jones v. S. (Tex. 1902), 69 S. W. 143; S. v. Sturgeon, 127 La. 459, 53 So. 703; P. v. Brown, 126 N. Y. S. 322; P. v. Corrigan, 129 A. D. 75, 113 N. Y. S. 513; Goodman v. P., 288 Ill. 154, 157, 81 N. E. 830.

11. Ib., §§ 572-595, 602, 603; aff'd S. v. Grayder, 44 La. Ann. 962, 32 Am. St. 358, 11 So. 573; S. v. Ford, 38 La. Ann. 797; S. v. Webster, 88 S. C. 56, 70 S. E. 422; P. v. Pfeiffer, 243 Ill. 200, 90 N. E. 680.

12. Post, § 425.

13. This sort of introduction, evidently superfluous, is not always retained.

14. See, for illustrative forms: Dir. & F., §§ 460, 461; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 391; Train & Heard Prec. 223; 3 Chit. Crim. Law, 1044 et seq.; S. v. Kroeger, 47 Mo. 552; Reg. v. Rinaldi, Leigh & C. 330, 9 Cox C. C. 391; Phelps v. P., 6 Hun, 428, 72 N. Y. 365; Rex v. Reeves, 2 Leach, 808, 819; Meserve v. C., 137 Mass. 109; S. v. Maas, 37 La. Ann. 292; S. v. Tisdale, 39 La. Ann. 476, 2 So. 406; Shannon v. S., 109 Ind. 407, 10 N. E. 87; S. v. Fries, 53 Ind. 489; May v. S., 17 Tex. Ap. 213; Agee v. S., 113 Ala. 52, 21 So. 207.

15. See S. v. Cook, 52 Ind. 574; Harrison v. S., 36 Ala. 248; P. v. Van Keuren, 5 Par. Cr. 66; Buck-

§ 402. **Ordinarily Sufficient**—are these allegations; but the offense in all its elements must be made affirmatively to appear. To accomplish which, it is sometimes necessary to set out also an explanatory fact, a foreign law, or other matter special to the individual case, as well as to cover by averment the terms of the statute on which the indictment is drawn.[16]

More minutely,—

§ 403. First. *The Setting out of the Forged Instrument:*—

By its Tenor.—As explained in the first volume,[17] the indictment by the common law rules, whether for forging a writing, for uttering it, or for having it in possession with the intent to utter it, must set it out by its tenor; its mere substance, or effect, will not suffice. The object of which requirement is, as usually stated, to enable the court to judge whether or not the instrument is one whereof forgery may be committed.[18] But—

land v. C., 8 Leigh, 732; C. v. Castles, 9 Gray, 123; P. v. Ellenwood, 119 Cal. 166, 51 P. 553.

16. For illustration, see Reg. v. Rinaldi, Leigh & C. 330; Reg. v. Toshack, 1 Den. C. C. 492, 4 Cox C. C. 38; Rex v. Szudurskie, 1 1 Moody, 429; C. v. Spilman, 124 Mass. 327, 26 Am. R. 668; Rembert v. S., 53 Ala. 467, 25 Am. R. 639; Moore v. S., 33 Ga. 225; S. v. Wheeler, 19 Minn. 98; C. v. Hinds, 101 Mass. 209; Reg. v. Boardman, 2 Moody & R. 147, 2 Lewin, 181; Rex v. Thompson, 2 Leach, 910; Testick's Case, 1 East, 181 note; Rex v. Barton, 1 Moody, 141; S. v. Thorn, 66 N. C. 644; Bynam v. S., 17 Ohio St. 142; Drake v. S., 19 Ohio St. 630. And see S. v. Cook, 52 Ind. 574.

17. Vol. II, §§ 559-563.

18. S. v. Jones, 1 McMul. 236, 36 Am. D. 257; S. v. Dourdon, 2 Dev. 443; S. v. Atkins, 5 Blackf. 458; Mason's Case, 1 East, 180, note; Dana v. S., 2 Ohio St. 91; S. v. Witham, 47 Me. 165; S. v. Twitty, 2 Hawks, 248; S. v. Bonney, 34 Me. 383; U. S. v. Fisler, 4 Bis. 59; S. v. Covington, 94 N. C. 913, 55 Am. R. 650; Thomas v. S., 18 Tex. Ap. 213; Smith v. S., 18 Tex. Ap. 399; U. S. v. Britton, 2 Mason, 464; S. v. Stuart, 61 Iowa, 203, 16 N. W. 91; Morris v. S., 17 Tex. Ap. 660; Glenn v. S., 116 Ala. 483, 23 So. 1; Evans v. S., 94 Ark. 400, 127 S. W. 743; Crossland v. S., 77 Ark. 537, 92 S. W. 776; Bennett v. S., 96 Ark. 101, 131 S. W. 213; P. v. Tilden, 242 Ill. 536, 90 N. E. 218; Com. v. Brewer, 24 Ky. L. 72, 67 S. W. 994; P. v. Chretien, 137 Cal. 450, 70 P. 305; Luttrell v. S., 85 Tenn. 286, 1 S. W. 886; S. v. McNaspy, 58 Kan. 691, 50

§ 404. **If the Instrument is Lost or Destroyed,**—or in the defendant's possession, or otherwise, where access to it cannot be had, the disabling fact may be averred, whereon the substance will suffice.[19] Yet without, at least, the substance, the indictment will be ill, though alleging all that is possible.[20]

§ 405. **The Word "Tenor,"**—though the better one in the averment of tenor, is not indispensable,[21]—a question

P. 895, 38 L. R. A. 756; S. v. Leonard, 171 Mo. 622, 71 S. W. 1017, 94 Am. St. 798; Davis v. S., 58 Neb. 465, 78 N. W. 930; Pierce v. S., 38 Tex. Cr. 604, 44 S. W. 292.

19. P. v. Badgley, 16 Wend. 53; Croxdale v. S., 1 Head, 139; S. v. Parker, 1 D. Chip. 298; Hooper v. S., 8 Humph. 93; Stephens v. S., Wright, 73; U. S. v. Britton, 2 Mason, 464; Munson v. S., 79 Ind. 541; P. v. Tilden, 242 Ill. 536, 90 N. E. 218; S. v. Peterson, 129 N. C. 556, 40 S. E. 9; West v. S., 45 Fla. 118, 33 So. 854; S. v. Imboden, 157 Mo. 83, 57 S. W. 536.

20. Wallace v. P., 27 Ill. 45. See Vol. II, §§ 495, 497, 498, 547. In New York, the following indictment was sustained on proof that the forged instrument was in the hands of the defendant: That on, etc., at, etc., the defendant, Samuel Kingsley, "did falsely and feloniously make, forge, and counterfeit, and did then and there willingly and feloniously act and assist in the false making, forging, and counterfeiting of a certain false, forged, and counterfeited bond and writing, obligatory for the payment of money, bearing date on some day to the jurors aforesaid unknown, in a penal sum to the jurors aforesaid unknown, with a condition thereunder written for the payment of a certain sum to the jurors aforesaid unknown, at some day thereafter to the jurors aforesaid unknown, with interest thereon to the said Samuel Kingsley, purporting to have been executed by one George Bockhoven, late of, etc.; which said false, forged, and counterfeited bond and writing, obligatory for the payment of money, is in the possession and custody of the said Samuel Kingsley; with intent to defraud one John Sinclair, against the form of the statute," etc. P. v. Kingsley, 2 Cow. 522, 14 Am. D. 520. In a Vermont case, where also the writing was alleged to be in the defendant's possession, so could not be more particularly described, it was held inadequately set out as "a certain writing, purporting to be a bond, with condition thereto annexed, signed, sealed, and executed by A, B, and C, and dated Jan. 8th, 1853." S. v. Briggs, 34 Vt. 501. And see C. v. Clancy, 7 Allen, 537; Mathena v. S., 20 Ark. 70; C. v. Spilman, 124 Mass. 327, 26 Am. R. 668.

21. Rex v. Powell, 2 W. Bl. 787, 1 Leach, 77; 2 East P. C. 976; S. v. Atkins, 5 Blackf. 458; Dana v. S., 2 Ohio St. 91; U. S. v. Hinman, Bald. 292; U. S. v. Mason, 12 Blatch. 497. "In substance as follows" was

already considered.[22]

§ 406. **The Copy,**—in a recital by tenor, should closely follow the original.[23] But a variance in the spelling, where the sound is preserved, will not vitiate it.[24] A bank-note was recited as payable to "E. lymour," and the note in evidence was to "E. Seymour": this was ill.[25] And the sum, for example, averred in an order, must be exactly the same in the proofs.[26] If the forgery of the name is by

held sufficient in Evans v. S., 94 Ark. 400, 127 S. W. 743. Where an indictment attempts to set forth an instrument according to its tenor, it is sufficient to use any form of expression indicating that a copy set forth is exact as "in the words and figures following," "as follows," "that is to say" but alleged that a note "is in substance as follows," "to-wit" is fatally defective. P. v. Tilden, 242 Ill. 536, 90 N. E. 218.

22. Vol. II, §§ 559 (3), 561.

23. Luttrell v. S., 85 Tenn. 232, 4 Am. St. 760, 1 S. W. 886; Cagle v. S., 39 Tex. Cr. Ap. 109, 44 S. W. 1097; Bedford v. S., 60 Tex. Cr. Ap. 83, 131 S. W. 314; "in the words and figures following," "that is to say," "as follows," may be used but not "in substance as follows, to-wit," when the indictment sets out the writing by its tenor, P. v. Tilden, 242 Ill. 536, 90 N. E. 218.

24. Vol. II, § 562; S. v. Bean, 19 Vt. 530; Rex v. Cooke, 2 East P. C. 921.

Illegible. How where the word is illegible, see Mathena v. S., 20 Ark. 70; C. v. Clancy, 7 Allen, 537; Rex v. Woods, Jebb, 115; Buckland v. C., 8 Leigh, 732; U. S. v. Mason, 12 Blatch. 497; Agee v. S., 113 Ala. 52, 21 So. 207; McClellan v. S., 32 Ark. 609, 611; Bench v. S., 63 Ark. 488, 39 S. W. 360; P. v. Munroe (Cal. 1894), 33 P. 776; P. v. Smith, 103 Cal. 563, 37 P. 516; (initials not material); P. v. Dole, 122 Cal. 486, 55 P. 581, 68 Am. St. 50; Telfair v. S., 56 Fla. 104, 47 So. 863; Allgood v. S., 87 Ga. 668, 13 S. E. 569; Hale v. S., 120 Ga. 183, 47 S. E. 531; Langdale v. P., 100 Ill. 263, 268; Trask v. P., 151 Ill. 523, 38 N. E. 248; Garmire v. S., 104 Ind. 444, 446, 4 N. E. 54; Stewart v. S., 113 Ind. 505, 508, 16 N. E. 186; S. v. Blanchard, 74 Iowa, 628, 38 N. W. 519, 520; Sutton v. Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. 184; S. v. Gryder, 44 La. Ann. 962, 965, 11 So. 573, 32 Am. St. 358; S. v. Harl, 137 Mo. 252, 38 S. W. 919; Roush v. S., 34 Neb. 325, 51 N. W. 755; S. v. Collins, 115 N. Car. 716, 20 S. E. 452; Westbrook v. S., 23 Tex. Ap. 401, 403, 5 S. W. 248; Lassiter v. S., 35 Tex. Cr. 540, 34 S. W. 751; Davis v. S., 37 Tex. Cr. 218, 39 S. W. 206; S. v. Duffield, 49 W. Va. 274, 38 S. E. 577.

25. Porter v. S., 15 Ind. 433; S. v. Carlson, 145 Iowa, 154, 123 N. W. 765.

26. S. v. Smith, 78 N. C. 462. And see S. v. Fay, 65 Mo. 490. If it is in figures in the writing, it must be so also in the indictment. Rex v. Powell, Bayley Bills, 5th

initials, the full name in the indictment will work a variance.[27] And in some circumstances, even the misspelling of such name will be fatal.[28]

§ 407. 1. **The Entire Operative Writing**—even to immaterial words in it, must be set out, yet not what is put around or attached to it for ornament or convenience, unless the pleader chooses.[29] Thus,—

2. **Figures in the Margin**—of a bill of exchange are not a part of it, but an index to it; so that, for example, forgery is not committed by altering them to correspond to the bill itself.[30] Therefore an indictment for forging such bill need not mention its marginal figures.[31] Again,—

3. **Ornaments—Number.**—The number of a bank-bill, and the devices, figures, and words in the margin, introduced for ornament or to prevent counterfeiting, need not be averred.[32] So,—

Ed. 562, 563; S. v. Carlson, 145 Iowa, 154, 123 N. W. 765; Burress v. Com., 27 Gratt. (Va.) 934, 544.

27. S. v. Fay, supra. Where the initial thus required is given in the indictment, no averment of the name it stands for is necessary. Rex v. Powell, supra. Compare with S. v. Bibb, 68 Mo. 286.

28. McClellan v. S., 32 Ark. 609; but compare Read v. S., 63 Ark. 618, 40 S. W. 85; Nichols v. S., 39 Tex. Cr. Ap. 80, 44 S. W. 1091.

29. Griffin v. S., 14 Ohio St. 55, and cases cited in the subsequent notes. That superfluous words in the instrument must be set out is evident, because otherwise there will be a variance between allegation and proof. Vol. II, §§ 488, 562; ante, § 406; Thomas v. S., 103 Ind. 419, 435, 2 N. E. 808; Johnson v. S. (Tex. 1905), 99 S. W. 404; Mackquire v. S., 91 Miss. 151, 44 So. 802; Haslip v. S., 10 Neb. 590, 592, 7 N. W. 331; S. v. Ridge, 125 N. C. 655, 34 S. E. 449. An indictment setting out the whole instrument need not set out the alterations constituting the forgery. Bennett v. S., 96 Ark. 101, 131 S. W. 213.

30. Smith v. Smith, 1 R. I. 398, 53 Am. D. 652.

31. S. v. Flye, 26 Me. 312; C. v. Bailey, 1 Mass. 62, 2 Am. D. 3; C. v. Stevens, 1 Mass. 203, 204. See Rex v. Eliot, Bayley Bills (5th Ed.) 557; S. v. McKiernan, 17 Nev. 224, 30 P. 831; U. S. v. Bennett, 17 Blatch. 357.

32. P. v. Franklin, 3 Johns. Cas. 299; Hamilton v. S., 8 Ind. 336; C. v. Taylor, 5 Cush. 605; C. v. Bailey, 1 Mass. 62; C. v. Stevens, 1 Mass. 203; S. v. Carr, 5 N. H. 367; Griffin v. S., 14 Ohio St. 55; S. v. Wheeler, 35 Vt. 261; Cross v. P., 47 Ill. 152, 95 Am. D. 474; U. S. v. Bennett, 17 Blatch. 357.

4. **A Signature by Mark**[33]—may appear in allegation without the mark.[34] And—

5. **Though a Revenue Stamp**—is by statute required to an instrument, not made void without it, no allegation of a stamp is essential in an indictment for forging the instrument.[35] But—

§ 408. 1. **The Pleader may**,—if he chooses, set out what is thus unnecessary.[36] Then,—

33. Bishop Con., § 345.

34. Reg. v. Smith, 1 Salk. 342. So I understand this case, though Starkie states it somewhat differently, then seems to question its correctness. 1 Stark. Crim. Pl. (2d Ed.) 103. The whole case, as reported by Salkeld, one of the best of the old reporters, is: "Indictment for forging a deed of assignment of a lease, signed with the mark of one Goddard, cujus tenor sequitur, but sets not down the mark as in the assignment; and this was objected, for that without that it could not be a forgery; sed non allocatur." I cannot doubt the correctness in principle of this decision. The defendant, we may assum, said to the court: "As the supposed maker of the assignment could not write, the original could not be good without the mark; therefore the indictment cannot be good unless the mark appears." But the court replied: "Assuming your premise to be correct, the result does not follow. The indictment sets out the forged name. The mark indicates the way of executing the signature. Suppose, for illustration, the man could not write an elegant hand, yet could write a bad hand which could be read; then it would have been impossible for him to execute the original unless he had done it in a bad hand. In such a case, if you had objected that the name in the indictment was written in an elegant hand, therefore it could not be good, we should say, sed non allocatur. It is necessary the indictment should contain the name, but not in fac-simile. Moreover, your premise is wrong; the signature would be in law, just as binding without the mark as with it; for, if A in the presence of B, and at his request writes the latter's name to an instrument, it is his signature, though there is no mark." Bishop Con., § 345. And see Cross v. P., 47 Ill. 152. If the pleader chooses, he may set out the mark in the indictment. Rex v. Dunn, Bayley Bills (5th. Ed.) 551.

35. New Crim. Law, II, § 540; S. v. Haynes, 6 Coldw. 550; Cross v. P., 47 Ill. 152; Miller v. P., 52 N. Y. 304, 11 Am. R. 706; Rex v. Hawkeswood, 2 T. R. 606, note; Horton v. S., 32 Tex. 79. And see Hall v. Jordan, 15 Wal. 393; C. v. McKean, 98 Mass. 9; S. v. Imboden, 157 Mo. 83, 57 S. W. 536.

36. For example, the name of the engraver in the margin of a bank-bill alleged to be forged. Thompson v. S., 9 Ohio St. 354, 356.

2. **Variance.**—It being descriptive, and in further particularization of the necessary part,[37] the averment in this, as in the rest, must correspond with the instrument in proof, or the variance will be fatal.[38]

§ 409. 1. **Date.**—Though a written contract may be good without a date, and the time of making a dated one may be shown to be other than thus appears,[39] still the date is a part of the instrument, and it should be set out with the rest in the indictment.[40] And—

2. **Name of State.**—On a trial for uttering a forged bank-bill of another State, where the name of such State constituted a part of the date, an omission of it from the allegation was held fatal. "For the words 'State of Maine,'" were deemed "part of the contract. They fix the *situs* of the bank, the place where the contract is made and to be

37. Vol. II, §§ 483, 485-487.

38. Griffin v. S., 14 Ohio St. 55, 61; U. S. v. Mason, 12 Blatch. 497; McDonnell v. S., 58 Ark. 242, 24 S. W. 105; Powell v. Com., 10 Ky. L. 329, 9 S. W. 245; Com. v. Wilson, 2 Gray (Mass.) 70, 71; S. v. Fleshman, 40 W. Va. 726, 22 S. E. 309. The omission from the pleading of words which are no part of the forged instrument is no variance. Evans v. S., 94 Ark. 400, 127 S. W. 743. See S. v. Carlson, 145 Iowa, 154, 123 N. W. 765. As to variances which have been held not material, including abbreviations, clerical errors and dates, see Shope v. S., 106 Ga. 226, 32 S. E. 140 ("numbers" and "nos"), Burlingim v. S., 61 Neb. 276, 85 N. W. 76, ("and no 100" before the word "dollars"), S. v. Childers, 32 Ore. 119, 49 P. 801; Emmons v. S. (Tex. 1897), 43 S. W. 578.

39. Bishop Con., §§ 114, 178.

40. C. v. Stevens, 1 Mass. 203.

Forgery by altering date. In some circumstances, and as to some instruments, the date is so far immaterial that an alteration of it will not vitiate the instrument as a contract. S. v. Miller, 3 Gill, 335; Terry v. Hazlewood, 1 Duv. 104; Miller v. Gilleland, 19 Pa. 119. But generally it is material, and the alteration will be fatal. Getty v. Shearer, 20 Pa. 12; Owings v. Arnot, 33 Mo. 406; Hocker v. Jamison, 2 Watts & S. 438; Lisle v. Rogers, 18 B. Monr. 528. And see Griffith v. Cox, 1 Tenn. 210; Ratcliff v. Planters' Bank, 2 Sneed (Tenn.) 425; Boyd v. McConnell, 10 Humph. 68; Collins v. Makepeace, 13 Ind. 448. Perhaps, in a case of the former sort, a recital in the indictment, omitting the date, may be good. It will be presumed that an alleged forged instrument was extended on its date. P. v. Campbell, 160 Mich. 108, 125 N. W. 42, 16 Det. L. N. 1082.

performed, and the law by which it is to be interpreted."[41] If the bank was domestic it would not necessarily be so; for then the State might be presumed to be that of the court, as in an allegation of venue.[42] But even then, standing with the month and day in the instrument, it would seem to be required equally in the setting out, as being a part of the writing.[43]

§ 410. **An Indorsement,**—on a note or check which without it is complete, so does not in law constitute a part of it, need not be set out in an indictment for the forgery thereof.[44] For the forgery of the indorsement, the indictment must have such averments as will make the offense affirmatively appear.[45]

§ 411. **For the Forgery of a Receipt**—for money, which refers to a bill of items, they need not be set out in the indictment.[46]

§ 412. 1. **"Tenor" dispensed with by Statutes.**—In England, 2 & 3 Will 4, c. 123, § 3, made it unnecessary "to set forth any copy or fac-simile" of the forged instrument, and declared sufficient any description of it "in such manner as would sustain an indictment for stealing the same." Archbold states that "this statute has been held to apply even to instruments which are not the subject of larceny either at common law or by statute."[47] It is now superseded

41. C. v. Wilson, 2 Bray, 70.

42. Vol. I, § 383.

43. Ante, § 407.

44. Miller v. P., 52 N. Y. 304, 305, 11 Am. R. 706; Hess v. S., 5 Ohio, 5, 22 Am. D. 767; C. v. Ward, 2 Mass. 397; Buckland v. C., 8 Leigh, 732; C. v. Adams, 7 Met. 50; Crossland v. S., 77 Ark. 537, 92 S. W. 776.

45. C. v. Spilman, 124 Mass. 327, 26 Am. R. 668; Cocke v. C., 13 Grat. 750. And see P. v. Marion, 29 Mich. 31.

46. Rex v. Testick, 2 East P. C. 925, 1 East, 181, note; Rex v. Thompson, 2 Leach, 632, note. See post, § 415; Rex v. Martin, 1 Moody, 483, 7 Car. & P. 549; Rice v. S., 1 Yerg. 432; New Crim. Law, II, § 546 (5). On a charge of forging a receipt it is not necessary to allege that the accused is indebted to the person against whom the receipt is forged. Gordon v. Com., 100 Va. 825, 833, 41 S. E. 746, see, also, Com. v. Ladd, 15 Mass. 526.

47. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 357. And see, for various interpretations, Reg. v. Robson, 2 Moody, 182, 9 Car. & P. 423; Reg. v. Collins, 2 Moody & R. 461; Rex v.

by 24 & 25 Vict. c. 98, § 42, permitting the instrument to be alleged simply "by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof"[48] In like manner,—

2. **Statutes**—in some of our States have variously modified the common law rule on this subject.[49]

§ **413.** Secondly. *The Purport Clause*:—

1. **The Name of the Forged Instrument,**—where the tenor is set out, need not in reason be given; even if it were important to be known, it is matter of law, and the court can see what it is. Still, many cases seem to assume, while probably it was never judicially held, that the name is necessary. And where, for example, it was given as a "crocket for five packs of linen cloth," the defendant moved in arrest of judgment on the ground that the quantity of cloth was uncertain. But the court deemed the allegation adequate.[50] The common method of averring the name is by a —

2. **Purport Clause—What—Whether Indispensable.**—In the ordinary form of the indictment, we have seen,[51] the instrument is, in a clause preceding the recitation of its tenor, introduced as "purporting" to be a bond, etc., or a bill of

Martin, 1 Moody, 483; Rex v. Burgiss, 7 Car. & P. 490; Rex v. Brewer, 6 Car. & P. 363; Reg. v. Sharpe, 8 Car. & P. 436; Reg. v. Vaughan, 8 Car. & P. 276; Reg. v. Davies, 9 Car. & P. 427; Reg. v. Smith, 2 Cox C. C. 358.

48. And see Archb. Crim. Pl. & Ev. (19th Ed.) 610.

49. S. v. Pons, 28 La. Ann. 43; S. v. Nelson, 28 La. Ann. 46; C. v. McKean, 98 Mass. 9; S. v. Clinton, 67 Mo. 380, 29 Am. R. 506; Coleman v. C., 25 Grat. 865, 879, 18 Am. R. 711; S. v. Hill, 30 Wis. 416; Chidester v. S., 25 Ohio St. 433; C. v. Hall, 97 Mass. 570; McGuire v. S., 37 Ala. 161; Jones v. S., 50 Ala. 161; S. v. Johnson, 26 Iowa, 407, 96 Am. D. 158; S. v. Henderson, 29 W. Va. 147, 1 S. E. 225; S. v. Gaubert, 49 La. Ann. 1692, 22 So. 930; Edwards v. S., 53 Tex. Cr. Ap. 50, 108 S. W. 673; S. v. Childers, 32 Ore. 119, 49 P. 801; S. v. Bullock, 54 S. C. 300, 32 S. E. 424.

50. Reg. v. Browne, 6 Mod. 87; s. c. nom. Reg. v. Brown, 3 Salk. 172.

51. Ante, § 401 (1).

exchange, etc., or whatever else it appears on its face to be. This is termed the purport clause. In reason, it is matter, not of fact, but of law, not for the jury, but for the court, and on familiar principles [52] it need not be alleged.[53] Therefore it is believed that this clause in the indictment is never necessary. It may contain what, if omitted, would leave the allegations inadequate; [54] but even then, the essential things may be equally well set out in some other form of words.

§ 414. **For giving the Statutory Name of the Forged Writing,**—this clause is appropriate. And in indictments on statutes, it is commonly employed, and there, if anywhere, it is essential; because, says Starkie, "it must invariably be shown on the face of the indictment, by proper averments, that the instrument forged is of the particular kind prohibited by the statute upon which the indictment is founded." [55] But, observed Buller, J., after explaining that the forms "have varied, and have been different from each other at different periods of time:" "If indictments for forgery were now merely to state that the prisoner 'forged a paper writing to the tenor and effect following, etc.,' and the instrument set out appeared on the face of it to be a bond, or bill of exchange, or any other of the instruments described in the statute, I should, as at present advised, see no objection to such a form." [56] And subsequent adjudication has established this *dictum* in authority, namely, that the statutory name of the forged instrument need not be mentioned, where, on all the allegations, the

52. Vol. I, §§ 329-332; Vol. II, §§ 514, 515.

53. **The purport**—of a writing is what it appears on its face to be. Hence, among other consequences, the forger cannot change the purport, so as to bring his forgery within the statute, by telling any falsehood concerning it. Rex v. Jones, 1 Leach, 204, 2 East P. C. 883, 1 Doug. 300. See New Crim. Law, II, § 594, note; Rex v. Reading, 2 Leach, 590; S. v. Stringfellow, 126 La. 720, 52 So. 1002; Leslie v. S., 10 Wyom. 10, 69 P. 2; P. v. McGlade, 139 Cal. 66, 72 P. 600; P. v. Bennett, 122 Mich. 281, 81 N. W. 117. Tenor and purport clauses must be separate and distinct. Forcy v. S., 55 Tex. Cir. 545, 117 S. W. 834.

54. Rex v. Wilcox, Russ. & Ry. 50; Snow v. S., 14 Wis. 479.

55. 1 Stark. Crim. Pl. (2d Ed.) 104.

56. Rex v. Gilchrist, 2 Leach, 657, 660, 661.

court can see that it is one the forgery whereof is by the statute made punishable.[57] Still,—

§ 415. 1. **To Avoid a Variance**—if the indictment undertakes to give the statutory name, it must do it correctly;[58] "for instance," says Archbold,[59] "if a bill of exchange be described as a promissory note, the defendant will be acquitted."[60] But a bank-bill may be introduced as a promissory note; because in law it is such.[61] And—

2. **Averring Extrinsic Matter.**—Where the nature, sort, or effect of the instrument does not affirmatively appear on its face, the extrinsic matter to show this must be alleged.[62]

57. C. v. Castles, 9 Gray, 123; U. S. v. Trout, 4 Bis. 105; P. v. Clements, 26 N. Y. 193; Fogg v. S., 9 Yerg. 392; S. v. Fenly, 18 Mo. 445; U. S. v. Williams, 4 Bis. 302. And see Reg. v. Pringle, 9 Car. & P. 408, 2 Moody, 127; S. v. Wheeler, 19 Minn. 98; P. v. Badgley, 16 Wend. 53; S. v. Gardiner, 1 Ire. 27; Sanderson's Case, 2 Lewin, 187; Reg. v. Williams, 2 Den. C. C. 61, 4 Cox C. C. 356, 2 Eng. L. & Eq. 533; Com. v. Bailey, 199 Mass. 583, 85 N. E. 857. Clear as thus appears to be the doctrine which renders the purport clause unnecessary, explained in this section and the last, it is still not certain that all our courts will yield to it their assent. And see S. v. Brown, 4 R. I. 528, 70 Am. D. 168. On the other hand, "I conclude," says McDonald, J. "upon principle and reason, that in no case of an indictment describing a forgery, and setting out the forged instrument in hœc verba, is it necessary to superadd the purport clause." U. S. v. Williams, 4 Bis. 302, 304.

58. Reg. v. Williams, 2 Car. & K. 51; S. v. Morton, 27 Vt. 310, 65 Am. D. 201; Reg. v. Williams, 2 Den. C. C. 61, 4 Cox C. C. 356, 2 Eng. L. & Eq. 533; Clark v. C., 16 B. Monr. 206; S. v. Page, 19 Mo. 213. And see S. v. Lytle, 64 N. C. 255; P. v. Marion, 28 Mich. 255; C. v. Brown, 147 Mass. 585, 9 Am. St. 736, 18 N. E. 587; Labbatie v. S., 6 Tex. Ap. 257. But see Johnson v. S., 62 Ga. 299.

59. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 357. See Rex v. Wilcox, Russ. & Ry. 50.

60. See Rex v. Hunter, Russ. & Ry. 511; Rex v. Birkett, Russ. & Ry. 251; C. v. Butterick, 100 Mass. 12, 16; Lloyd v. Oliver, 18 Q. B. 471.

61. C. v. Carey, 2 Pick. 47; Hobbs v. S., 9 Mo. 855; Stat. Crimes, § 336.

62. Stat. Crimes, §§ 335, 341, 342; New Crim. Law, II, § 546; ante, § 402; post, § 418a; S. v. Briggs, 34 Vt. 501; S. v. Wheeler, 19 Minn. 98; C. v. Hinds, 101 Mass. 209; Hendricks v. S., 26 Tex. Ap. 176, 8 Am. St. 463; S. v. Weaver, 94 N. C. 836, 55 Am. R. 647; Jacobs v. S., 61 Ala. 448; Shannon v. S., 109 Ind. 407, 10 N. E. 87; Dixon v. S., 81 Ala. 61, 1 So. 69; Sanabria v. P., 24 Hun, 270; C. v. Dunleay, 157 Mass. 386, 32 N. E. 356;

If, for example, by usage, or in consequence of facts known to the parties, a writing incomplete in its terms is treated as a receipt [63] or an order,[64] or if initials are employed instead of the full names,[65] allegations supplying the omission become necessary. But "the words 'Settled, Sam. Hughes,' written at the foot of a bill of parcels, were held of themselves to import a receipt of acquittance;" so that no explanatory averment was required.[66]

§ 416. **Where the purport is alleged,**—as above explained, whether necessarily [67] or not,[68] the allegation must harmonize in terms with the tenor, or the indictment will be ill,[69]

Stewart v. S., 113 Ind. 505, 16 N. E. 186; Rembert v. S., 53 Ala. 467, 25 Am. R. 639; King v. S., 27 Tex. Ap. 567, 11 Am. St. 203. And see McGarr v. S., 75 Ga. 155; Baysinger v. S., 77 Ala. 63, 54 Am. R. 46; Griffin v. S., 96 Miss. 309, 51 So. 466; S. v. Floyd, 169 Ind. 186, 81 N. E. 1153; Chappel v. S., 58 Tex. Cr. 52, 124 S. W. 657, 658; Reeves v. S., 51 Tex. Cr. Ap. 604, 103 S. W. 894; P. v. Terrill, 127 Cal. 99, 59 P. 836; Johnson v. S., 109 Ga. 268, 34 S. E. 573; Klawanski v. P., 218 Ill. 481, 75 N. E. 1028; S. v. Lea, 108 La. 496, 32 So. 147; Com. v. Bond, 188 Mass. 91, 74 N. E. 293; Farcy v. S., 55 Tex. Cr. 545, 131 S. W. 585; contra, S. v. Bierbauer, 111 Minn. 129, 126 N. W. 406; S. v. Jackson, 221 Mo. 478, 120 S. W. 66.

63. Stat. Crimes, § 342; Rex v. Hunter, 2 Leach, 624, 2 East P. C. 928.

64. Stat. Crimes, § 335.

65. Rex v. Barton, 1 Moody, 141; Bynam v. S., 17 Ohio St. 142.

66. Archb. ut sup.; Rex v. Martin, 1 Moody, 483; Rex v. Houseman, 8 Car. & P. 180; Reg. v. Vaughan, 8 Car. & P. 276; Reg. v. Boardman, 2 Moody & R. 147, 2 Lewin, 181. See Reg. v. Rogers, 9 Car. & P. 41; Rex v. Thompson, 2 Leach, 910. It need not be alleged that a corporation is a domestic corporation, Bennett v. S., 96 Ark. 101, 131 S. W. 213, or that an association or company is a corporation or a partnership. Blais v. S., 94 Ark. 327, 126 S. W. 1064; Reeseman v. S., 59 Tex. Cr. 430, 128 S. W. 1026.

67. See, however, S. v. Crawford, 13 La. Ann. 300.

68. S. v. Shawley, 5 Hayw. 256.

69. S. v. Farrand, 3 Halst. 333; S. v. Bean, 19 Vt. 530; Rex v. Gilchrist, 2 Leach, 657; Luttrell v. S., 85 Tenn. 232, 4 Am. St. 760, 1 S. W. 886. See C. v. Welch, 148 Mass. 296, 19 N. E. 357; Ham v. S., 4 Tex. Ap. 645; P. v. Mann, 75 N. Y. 484, 31 Am. R. 482; Carter v. S., 55 Tex. Cr. 43, 114 S. W. 839. The rule by which, under particular circumstances, extrinsic facts may or must be set out does not require or permit allegations of extrinsic facts showing how the forged instrument may accomplish its fraudulent purpose either necessarily or probably where the writing, by

unless it can be rejected as surplusage.[70] Thus, if however unnecessarily the name of the maker of a forged note appears in the purport clause, yet varies from that in the tenor clause, the repugnance will be fatal.[71] So an allegation that a forged check purports to be "on the City Bank of Dallas" is repugnant to a recitation of it as on the "City Bank," omitting the words "of Dallas;" and it will render the count bad.[72] But where Tristram Tupper was introduced in the purport clause as the maker of a forged writing, and by the tenor clause it appeared to have been signed T. Tupper, then the forgery was charged to have been done to defraud Tristram Tupper, the variance was immaterial.[73]

§ **417.** Thirdly. *Further of alleging the Forged Writing*:—

1. **Repugnance**—should be avoided.[74] Thus,—

2. "**Signed**"—is ill; because if the writing was signed, it was not forged.[75] But—

§ **418.** 1. "**Forged,**"—while not strictly accurate, may be used if in the statute; as, if it is made punishable to "forge any *will*, or *bond*, or *writing obligatory*," etc., the averment may be, says Starkie,[76] "that the defendant forged the will,[77] bond, or writing obligatory."[78] On the other hand,—

its language clearly shows how, if genuine, it might bring about the effect and purpose desired. Meldrum v. S., 151 U. S. 177, 181, 80 C. C. A. 545.

70. Myers v. S., 101 Ind. 379.

71. S. v. Houseal, 2 Brev. 219, 222. And see Rex v. Reeves, 2 Leach, 808; Rex v. Edsall, 1 East, 180, note. Purport clause need not allege name of maker. Rhudy v. S., 42 Tex. Cr. 225, 58 S. W. 1007; Leslie v. S., 104 Wyo. 10, 69 P. 270.

72. Roberts v. S., 2 Tex. Ap. 4.

73. S. v. Jones, 1 McMul. 236, 36 Am. D. 257. Compare this case with the cases cited in the last note but one. And see S. v. Calvin, R. M. Charl. 151; S. v. Gustin, 2 Southard, 749; C. v. Hall, 97 Mass. 570; Fogg v. S., 9 Yerg. 392; S. v. Bibb, 68 Mo. 286.

74. Vol. II, § 490 (1); S. v. Cook, 52 Ind. 574; P. v. Hoyt, 130 N. Y. S. 505.

75. Rex v. Carter, 2 East P. C. 985. And see Vol. I, § 490 (1).

76. 1 Stark. Crim Pl. (2d Ed.) 104, 105.

77. Rex v. Birch, 1 Leach, 79, 2 East P. C. 980.

78. Dunnett's Case, 2 East P. C. 985; S. v. Gardner, 1 Ire. 27; P. v. Rynders, 12 Wend. 425. And see

2. "**Forged a Writing purporting.**"—Instead of such form, "it is," continues this author, "in all cases proper and seemingly more correct to aver that the defendant forged and counterfeited a certain paper writing *purporting* to be the last will (or other instrument whose forgery is penal)." So that the pleader may elect the form he prefers.[79] Again,—

3. **Forging Indorsement.**—If the structure of a promissory note is such that it becomes complete only by an indorsement, the allegation is good that the defendant forged the indorsement.[80]

§ 418 a. 1. **Ambiguities in Instrument.**—Since the indictment must show *prima facie* guilt,[81] where it is uncertain on the face of a writing whether or not it is of legal efficacy if genuine,[82] something more than a mere setting out of its tenor is required.[83] This has been already in part explained.[84] For example,—

2. **If an Agent's Order on his Principal**—constitutes the forgery, and the alleged intent is to defraud him, the authority of the agent thus to bind him must be averred; because otherwise, said Pearson, C. J., "there is nothing from which the court can see that the false paper had a tendency to defraud" this person.[85] But doubtless if the intent were

S. v. Houseal, 2 Brev. 219; P. v. Mitchell, 92 Cal. 590, 28 P. 597; King v. S., 43 Fla. 211, 31 So. 254, 256; S. v. Greenwood, 76 Minn. 211, 78 N. W. 1042, 1043 ("forge" is a statement of fact.) Webb v. S., 39 Tex. Cr. 534, 47 S. W. 556; Cagle v. S., 39 Tex. Cr. 109, 44 S. W. 1097.

79. Rex v. Birch, 1 Leach, 79, 2 W. Bl. 790, 2 East P. C. 980.

80. C. v. Dallinger, 118 Mass. 439.

81. Vol. I, § 326; Vol. II, §§ 509, 513, 519, 521; Millsaps v. S., 38 Tex. Cr. Ap. 570, 43 S. W. 1015.

82. New Crim. Law, II, § 545.

83. Clarke v. S., 8 Ohio St. 630, 634; C. v. Hinds, 101 Mass. 209, 211; Rembert v. S., 53 Ala. 467, 25 Am. R. 639; Vincent v. P., 5 Par. Cr. 88. And see Williams v. S., 51 Ga. 535; Drake v. S., 19 Ohio St. 211; P. v. Tomlinson, 35 Cal. 503; Com. v. Tabor, 31 Ky. L. 840, 104 S. W. 261.

84. Ante, § 415.

85. S. v. Thorn, 66 N. C. 644, 645. In a case where forgery of a railroad pass was charged a recital of the instrument "Pass foreman and twelve men" was held insufficient without extrinsic allegation as to how they were to pass and

laid to defraud the one to whom the order was passed, this authority need not be alleged; because forgery may be committed even of a fictitious name.[86] Again,—

3. **Under Seal—("Deed"—"Bond").**—If the instrument is of a sort to have effect only when under seal, or if by the statute it must be a "bond" or "deed," where a seal is implied,[87] terms indicating a seal must be employed in the indictment;[88] for which purpose, "deed" alone, for example, will suffice.[89] Where the forgery is of a deed of land, the indictment need not go further and allege that had it been valid it would have conveyed the land.[90]

§ 419. 1. The Altering of an Instrument—makes it in law a new one.[91] And—

2. **The Indictment,**—where the forgery consists in altering a genuine writing,[92] and lay it as of the whole,[92a] according to the legal effect of the transaction, or specially aver the alteration, according to the outward form, at the election of the pleader.[93] And proof of a material alteration,[94] or of the forgery of a material part,[95] will sustain

over what lines. Goodman v. P., 228 Ill. 154, 159, 81 N. E. 830. See New Crim. Law, II, §§ 543, 599.

86. New Crim. Law, II, §§ 543, 547; post, § 423.

87. Bishop Con. §§ 105, 108; S. v. Butler, 47 Minn. 483, 50 N. W. 532. See also P. v. Dewey, 35 Hun, 308.

88. Rex v. Newton, 3 Keb. 357, 367, 388, cited 2 Ld. Raym. 921; Reg. v. Goddard, 2 Ld. Raym. 920.

89. Paige v. P., 3 Abb. Ap. 439; S. v. Fisher, 65 Mo. 437. See S. v. Lytle, 64 N. C. 255. If the fraudulent character of the forged instrument is not manifested on its face, the deficiency must be supplied by extrinsic allegations. Com. v. Dunleay, 157 Mass. 386, 32 N. E. 356.

90. S. v. Fisher, supra. Indictment need not allege injury to prosecuting witness or his estate. Snow v. S., 85 Ark. 203, 107 S. W. 980. And compare with U. S. v. Lawrence, 13 Blatch. 211. See also P. v. Van Alstine, 57 Mich. 69, 23 N. W. 594.

91. Bishop Con., §§ 133, 136, 764, 766, 768; Gordon v. Com., 100 Va. 825, 41 S. E. 746.

92. New Crim. Law, II, §§ 523, 573-578.

92a. S. v. Maxwell, 47 Iowa, 454; Com. v. Boutwell, 129 Mass. 124; S. v. Eaton, 166 Mo. 575, 66 S. W. 539.

93. Vol. I, §§ 332-334; S. v. Gardiner, 1 Ire. 27; S. v. Weaver, 13 Ire. 491; Bittings v. S., 56 Ind. 101; P. v. Marion, 29 Mich. 31.

94. S. v. Gardiner, supra; S. v. Marvels, 2 Harring. (Del.) 527.

95. C. v. Butterick, 100 Mass. 12, 18; P. v. Clements, 26 N. Y. 193.

a charge of forging the entire instrument. If the pleader adopts the outward form, and avers that the defendant altered a genuine instrument, he must set it out by its tenor as it was before the alteration, and then distinctly state what alteration was made.[96]

§ 420. Fourthly. *The Allegations of the Fraudulent Intent and of the Person meant to be Defrauded*:—

Essential—(Public Forgeries—Private).—Since forgery is an actual or attempted cheat,[97] the fraudulent purpose, and the name of the individual meant to be cheated, must, as in other cheats,[98] be charged in the indictment when known, and proved at the trial.[99] If the contemplated fraud is to take effect on the public,[1] then the allegation should accord with this fact.[2]

§ 421. **How Minutely.**—Details, such as how the fraud was to be effected, need not be stated; but "it is sufficient to aver a general intent to defraud a certain person, which intention may be made out by the facts in evidence at the trial."[3] This person's residence need not be given, unless

96. S. v. Fisher, 58 Mo. 256; S. v. Bryant, 17 N. H. 323; Bittings v. S., supra; Kahn v. S., 58 Ind. 168; S. v. Riebe, 27 Minn. 315, 7 N. W. 262. And see Moore v. S., 33 Ga. 225; S. v. Greenlee, 1 Dev. 523, 525; P. v. O'Brien, 96 Cal. 171, 31 P. 45; S. v. Stephens, 45 La. Ann. 702, 12 So. 883.

97. Ante, § 399.

98. Ante, §§ 158 (2), 159 (1).

99. New Crim. Law, II, § 543, 1 Stark. Crim Pl. (2d Ed.) 112; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 358; S. v. Odel, 3 Brev. 552; Harrington v. S., 54 Miss. 490; Cunningham v. S., 49 Miss. 685; Reg. v. Tylney, 1 Den. C. C. 319; Reg. v. Powner, 12 Cox C. C. 235, 4 Eng. Rep. 525; Shinn v. S., 57 Ind. 144; P. v. Mitchell, 92 Cal. 590, 28 P. 597. See P. v. D'Argencour, 95 N. Y. 624, 629; S. v. Tingler, 32 W. Va. 546, 25 Am. St. 830, 9 S. E. 935; S. v. O'Connell, 144 Iowa, 559, 123 N. W. 201; S. v. Weaver, 149 Iowa, 403, 128 N. W. 559; S. v. Cordray, 200 Mo. 29, 98 S. W. 1 (unless otherwise provided by statute).

1. New Crim Law, II, §§ 161. 596 (2).

2. Ante, §§ 210, 233, 243; Gregory v. S., 11 Ohio St. 329; Cunningham v. S., supra; S. v. Kimball, 50 Me. 409.

3. Rex v. Powell, 1 Leach, 77, 78, 2 W. Bl. 787, 2 East P. C. 976; Paige v. P., 3 Abb. Ap. 439. See P. v. Marion, 28 Mich. 255. Did forge a promissory note for £50, "on which said promissory note is an indorsement as follows, C. J., with intent to defraud W. R. S.," sufficiently charges that the fraud

made essential by special terms in the statute.[4] The intent may be laid to defraud a township named[5] or the State,[6] if the fact is so.

§ 422. 1. **Defraud whom?—(Election).**—Generally, not always, the averred intent may be to defraud one or another of two or even more persons or corporations, at the election of the pleader.[7] Thus,—

2. **The Law presumes,**—in the forgery of the name of an existing person or corporation, that the forger intended to defraud him or it, and the indictment may lay his purpose accordingly, whatever be the real fact.[8] He meant also to defraud the person to whom he passed or attempted to pass the forged writing for value; and the pleader may so state the intent. if he chooses.[9] But—

meant was to be effected through the note, not the indorsement. Rex v. James, 7 Car. & P. 553. The intent must be charged directly, not as a legal deduction from alleged facts. Drake v. S., 19 Ohio, 211; Vol. I, § 325; Vol. II, §§ 508, 520 (2).

4. S. v. Houseal, 2 Brev. 219.

5. Gregory v. S., 11 Ohio St. 329.

6. Cunningham v. S., 49 Miss. 685.

7. New Crim. Law, II, §§ 543 (2), 598, 599. Unnecessary to state whether an association to be defrauded is corporation or partnership. Blais v. S., 94 Ark. 327, 126 S. W. 1064. All steps necessary to perfect or to accomplish the fraudulent intent need not be alleged. S. v. Zimmerman, 79 S. E. 289, 60 S. E. 680; Snow v. S., 85 Ark. 203, 107 S. W. 280; P. v. McPherson, 6 Cal. Ap. 266, 91 P. 1098; P. v. Johnson, 7 Cal. Ap. 124, 93 P. 1042; McLean v. S., 3 Ga. Ap. 660, 60 S. E. 332.

8. Ib.; Rex v. Mazagora, Russ. & Ry. 291; Rex v. Sheppard, Russ. & Ry. 169; Rex v. Holden, Russ. & Ry. 154, 2 Leach, 1019, 2 Taunt. 334; Reg. v. Cooke, 8 Car. & P. 586; S. v. Haynes, 6 Coldw. 550; Shinn v. S., 57 Ind. 144. Indictment is not fatally defective because it fails to allege an intent to defraud any particular person. Brazil v. S., 117 Ga. 32, 43 S. E. 460; Benson v. S., 122 Ala. 100, 26 So. 119, affirmed 124 Ala. 92, 27 So. 1; Williams v. S., 126 Ala. 50, 28 So. 632; Darby v. S., 41 Fla. 274, 26 So. 315; S. v. Stegman, 62 Kan. 476, 63 P. 746; S. v. Gaubert, 49 La. Ann. 169, 22 So. 930; S. v. Turner, 148 Mo. 206, 49 S. W. 988; Pohr v. S., 60 N. J. L. 576, 38 A. 673; Crayton v. S., 47 Tex. Cr. 88, 80 S. W. 839; contra, Barnes v. Com., 101 Ky. 556, 19 Ky. L. 803, 41 S. W. 772.

9. Ib.; U. S. v. Shellmire, Bald. 370; Rex v. Rushworth, Russ. & Ry. 317, 1 Stark. 396; Harris v. P., 9 Barb. 664; Reg v. Cooke, 8 Car. & P. 586; Rex v. Holden, Russ. & Ry. 154, 2 Leach, 1019, 2 Taunt.

§ 423. Where a Fictitious Name,—whether of a person or corporation, is the subject of the forgery, an averment that the intent was to defraud such non-existing person or corporation cannot be true in fact or sustained by proof, so that practically it will be ill.[10] Yet the other form remains for a case of this sort.

§ 424. Where the Intent is to defraud Partners,—the allegation need not be in the form essential in laying ownership. There the indictment must set out all the names of joint owners.[11] But here, when the purpose is to defraud two or more, whether constituting a firm or not, the intent is also to defraud each of them; therefore the indictment may lay it as to all, or as to one or more less than all, at the pleader's pleasure.[12]

§ 425. 1. Knowledge of the Forgery,—or spurious character of the instrument, must, in utterings, in having in possession with intent to utter, and the like, be averred and proved, being an essential element in the criminal intent.[13] And—

2. **The Indictment for Uttering**—should give the name of the person to whom the forged instrument was tendered, if known; or if not known, state this in excuse for the omission.[14]

334; Hooper v. S., 8 Humph. 93, S. v. Blodgett, 143 Iowa, 578, 121 N. W. 685.

10. New Crim. Law, II, § 543; P. v. Ellenwood, 119 Cal. 166, 51 P. 553; P. v. McPherson, 6 Cal. Ap. 266, 91 P. 1098.

11. Post, § 723.

12, S. v. Hastings, 53 N. H. 452; P. v. Curling, 1 Johns. 320; Dixon's Case, 2 Lewin, 178; Reg. v. Hanson, 2 Moody, 245; Rex v. Lovell, 1 Leach, 248; S. v. Hall, 108 N. Car. 776, 13 S. E. 189, 190. See S. v. Harrison, 69 N. C. 143; Labbaite v. S., 6 Tex. Ap. 483.

13. Anderson v. S., 7 Ohio (2d pt.) 250; Anonymous, 11 Mod. 3; S. v. Anderson (Del. 1910), 74 A. 1097; Feeney v. S., 58 Tex. Cr. 152, 124 S. W. 944; P. v. Elphis, 139 Cal. XIX, 72 P. 838; S. v. Swensen, 13 Idaho, 1, 81 P. 379; S. v. Hauser, 112 La. 313, 36 So. 396; Shelton v. S., 143 Ala. 98, 39 So. 377; Powers v. S., 87 Ind. 97; P. v. Smith, 103 Cal. 563, 37 P. 516, "knowingly" uttered, S. v. Williams, 139 Ind. 43, 38 N. E. 339.

14. Ante, § 250 (2); McClellan v. S., 32 Ark. 609; Goodson v. S., 29 Fla. 511, 523, 10 So. 738. Anonymous, 1 East P. C. 180; Buckley v. S., 2 Greene (Iowa), 162; ante, §

§ 425 a. **Different Intents**—may, to avoid danger of a variance, or difficulties in the proofs, be set out in separate counts,—as, to defraud different individuals or corporations,—a method sometimes recommended.[15] In reason, this prolixity is unnecessary; but the intent to defraud any number of victims may be laid in one count, which will not thereby be rendered double, and the allegation will be sustained by proof of it as to any one of them. The writer does not remember to have seen this method practised.[16]

§ 425 b. 1. **Legislation in England**—has in recent times rendered unnecessary the mention of the name of the person to be defrauded, permitting simply a general allegation of fraudulent intent.[17] And—

2. **Statutes in some of our States**—have adopted this sort of enactment.[18]

404. It is not material that no person has suffered any actual loss by the uttering. S. v. Calhoun, 75 Kan. 259, 88 P. 1079. Under some statutes the name of the person to whom uttered need not be alleged. S. v. Hart, 67 Iowa, 142, 145 N. W. 99; S. v. Adams, 39 La. Ann. 238, 1 So. 435.

15. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 358; 3 Chit. Crim. Law, 1048 et seq.

16. Compare ante, §§ 150, 424; Rex v. Lovell, 1 Leach, 248; Noakes v. P., 25 N. Y. 380, 387, 388.

17. New Crim. Law, II, § 599 (3); Archb. Crim. Pl. & Ev. (19th Ed.) 605, 611. Stat. 14 & 15 Vict. c. 100, § 8, is re-enacted in 24 & 25 Vict. c. 98, § 44; Reg. v. Trenfield, 1 Fost. & F. 43. As to the indictment under 7 Geo. 4, c. 46, see Rex v. James, 7 Car. & P. 553. "Intent to cheat and defraud" in an indictment for forging a bill of lading is good under a statute punishing forgery "with intent to injure and defraud." S. v. Harroun, 199 Mo. 519, 525, 98 S. W. 467.

18. McClure v. C., 86 Pa. 353; S. v. Tingler, 32 W. Va. 546, 25 Am. St. 830; S. v. Cross, 101 N. C. 770, 9 Am. St. 53, 7 S. E. 715; P. v. Van Alstine, 57 Mich. 69, 23 N. W. 594; S. v. Rucker, 93 Mo. 88, 5 S. W. 609; S. v. Gavigan, 36 Kan. 322, 13 P. 554; S. v. Warren, 109 Mo. 430, 19 S. W. 191, 32 Am. St. 681; S. v. Phillips, 78 Mo. 49; S. v. Jackson, 89 Mo. 561, 1 S. W. 760; S. v. Lurch, 12 Ore. 104, 6 P. 41; S. v. Maxwell, 47 Iowa, 454; S. v. Clement, 42 La. Ann. 583, 7 So. 685; McDonnell v. S., 58 Ark. 242, 24 S. W. 105; S. v. Weaver, 149 Iowa, 403, 128 N. W. 559; Williams v. S., 126 La. 50, 28 So. 632; Darby v. S., 41 Fla. 274, 26 So. 315; S. v. Gullette, 121 Mo. 447, 26 S. W. 354; Rohr v. S., 60 N. J. L. 576, 38 A. 673; S. v. Hart, 67 Iowa, 142, 145, 25 N. W. 99 (uttering) S. v. Adams, 39 La. Ann. 238, 180, 435.

§ 426. Fifthly. *The Allegation of the Criminal Act*:—

1. **"Did Forge and Counterfeit"—("Falsely").**—It suffices to allege "that the defendant forged and counterfeited, though," says Starkie, "it is usual to aver that he did *falsely* forge and counterfeit; for the adverb is sufficiently implied in the former words." [19]

2. **Other Adverbs and Verbs**—are sometimes connected with these; but obviously they are unnecessary when these are employed, and the offense is only misdemeanor.[20]

3. **"Ordinary and Concise Language."**—In a few of the States, statutes require every indictment to set out the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended,[21]—substantially in af-

19. 1 Stark. Crim. Pl. (2d Ed.) 98, referring to 2 East P. C. 985; Rex v. Mariot, 2 Lev. 221; Rex v. Dawson, 1 Stra. 19. See also Reg. v. King, 7 Mod. 150, 1 Salk. 342; Rex v. Johnson, 2 Show. 1; 2 Russ. Crimes (5th Ed.) 695; Turnipseed v. S., 45 Fla. 110, 33 So. 851; P. v. Mitchell, 92 Cal. 590, 28 P. 597; S. v. McKiernan, 17 Nev. 224, 30 P. 831.

20. Some of the forms are, "unlawfully, knowingly, and falsely did forge and counterfeit," Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 391; "feloniously did forge and counterfeit," 3 Chit. Crim. Law, 1048; "knowingly, falsely, and fraudulently did write and counterfeit," Rex v. Rutter, Trem. P. C. 127; "subtly, falsely, and fraudulently did make and forge," Rex v. Ivy, Trem. P. C. 135; "did unlawfully, feloniously and falsely make, forge, and counterfeit," S. v. Kroeger, 47 Mo. 552; "feloniously did forge and counterfeit," Van Horne v. S., 5 Pike, 349; "did make, forge, and counterfeit," S. v. Johnson, 26 Iowa, 407, 96 Am. D. 158; nearly the same, Rosekrans, v. P., 5 Thomp. & C. 467, 3 Hun, 287. The late forms in Archbold have simply "feloniously did forge," Archb. Crim. Pl. & Ev. (19th Ed.) 609; Archb. New Crim. Pro. 534. And so the form seems to have been in Rex v. James, 7 Car. & P. 553. Probably it is not necessary, even at the common law, to employ both the verbs "forge" and "counterfeit;" and plainly, where the indictment is on a statute, only the statutory term will be required. The expression "to counterfeit" carries to the mind the idea of a false making; and East says that "forge" "is always taken in an evil sense in our law." 2 East P. C. 985; Haskins v. Ralston, 69 Mich. 63, 13 Am. St. 376, 37 N. W. 45. Compare with Dir. & F., § 460; "feloniously forged," P. v. Hoyt, 130 N. Y. S. 505; King v. S., 43 Fla. 211, 31 So. 254.

21. Stowers v. C., 12 Bush, 342; P. v. Alderdice, 105 N. Y. S. 395.

firmance of the common law rule.[22] Yet under this provision the Kentucky court holds the common law form, "did forge and counterfeit," to be inadequate as averring a legal conclusion instead of the required act.[23] Doubtless, on the other hand, the majority of our courts would hold the immemorial "forge and counterfeit" sufficiently to denote an act in distinction from a conclusion of law.[24]

4. **For "Altering"**—a valid instrument,[25] there appears to be no settled common law form, but each case conforms to the special facts.[26] If the statute has the word "alter," it will almost and perhaps absolutely as of course be employed in the indictment;[27] and so it may be in an indictment on a statute without this word, if the accompanying averments bring the case within the statute.[28]

5. **"Feloniously,"**—if the forgery is felony, should in most of our States appear in the allegation.[29]

6. **A Due Connection**—should be made between the words indicating the criminal act and the setting out of

22. Vol. I, §§ 329-335; Vol. II, §§ 508, 514.

23. C. v. Williams, 13 Bush, 267; Stowers v. C., supra. See S. v. Knippa, 29 Tex. 295.

24. See S. v. Foster, 30 Kan. 365, 2 P. 628.

25. Ante, § 419.

26. An indictment for altering a record set out an entry therein, and averred that the defendant afterward, at a time and place, "falsely, unlawfully, fraudulently, and deceitfully did erase, expunge, and entirely obliterate" the same; and afterward, at the said time and place, on another folio, "falsly, unlawfully, fraudulently, and deceitfully did forge, write, enter, and insert" words set out. Rex v. Newman, Trem. P. C. 130. In another case, the averment was that in the writing set out, the defendant altered a word mentioned by erasing certain letters and substituting others. The exact charge was that he altered "birch" to "batch" by erasing irc, and inserting atc, and this was held to be proved by showing a substitution of at for ir. S. v. Rowley, Brayt. 76. And see P. v. Palmer, 53 Cal. 615; S. v. Thornburg, 6 Ire. 79, 44 Am. D. 67.

27. Archb. New Crim. Pro. 535; Rex v. Post, Russ. & Ry. 101. See S. v. Knippa, 29 Tex. 295.

28. Elsworth's Case, 2 East P. C. 986; S. v. Willard, 219 Mo. 721, 119 S. W. 416; Mackguire v. S., 91 Miss. 151, 44 So. 802, where the statute does not use "feloniously." Cohen v. P., 7 Colo. 274, 3 P. 385; Com. v. Lemon, 18 Ky. L. 480, 37 S. W. 61; see, also S. v. Murphy, 17 R. I. 698, 24 A. 473.

29. Vol. II, §§ 534-536.

the false instrument; as, it is ill to say that the defendant forged a writing *containing* the one forged.[30] The averment may be that he uttered a "false, forged, and counterfeited bank-note;" these words not being repugnant.[31] They signify that it purports to be, but is not, genuine.[32] And the allegation may be that the defendant falsely forged a false writing.[33]

7. **The Value**—of the forged instrument need not be averred.[34] But it is sometimes evidence of the fraudulent intent.[35]

II. *In General of the Evidence.*

§ 427. 1. **The Proofs of this Offense**—depend partly on rules special to it, but more on those common to all issues.

2. **In this Sub-title,**—we shall collect such of the former as were not considered in connection with the indictment; and for convenience in practice bring to view some of the latter. The order is not material.

3. **The Intent to Defraud**—a person or the public, not necessarily a fraud consummated,[36] must be proved, in general and as to the individual, conformably to the allegation.[37] The question is for the

30. Rex v. Neck, 2 Show. 472.

31. Mackey v. S., 3 Ohio St. 362, perhaps overruling or qualifying Kirby v. S., 1 Ohio St. 185.

32. U. S. v. Howell, 11 Wall. 432.

33. Rex v. Goate, 1 Ld. Raym. 737.

34. S. v. Clement, 42 La. Ann. 583, 7 So. 685. Nor proved, Hurst v. S., 1 Ala. Ap. 235, 56 So. 18.

35. Berrisford v. S., 66 Ga. 53.

36. New Crim. Law, II, § 698; Rex v. Crooke, 2 Stra. 901; Rex v. Goate, 1 Ld. Raym. 737; Bush v. S., 77 Ala. 83; S. v. Cross, 101 N. C. 770, 9 Am. St. 53, 7 S. E. 715. For forgery being an attempt, the crime may exist though from circumstances unknown to the defendant there can be no consummation of the fraud. Rex v. Holden, Russ. & Ry. 154. See New Crim. Law, I, §§ 738-744, 748 (2), 754.

37. Ante, § 420 et seq.; Reg. v. Tylney, 1 Den. C. C. 319; Rembert v. S., 53 Ala. 467, 468, 25 Am. 639; Agee v. S., 113 Ala. 52, 21 So. 207; Elsey v. S., 47 Ark. 572, 2 S. W. 337; P. v. Elphis, 72 Pac. 838, 139 Cal. XIX; S. v. Anderson (Del. 1910), 74 A. 1097; Barfield v. S., 29 Ga. 127, 74 Am. Dec. 49; S. v. Swensen, 13 Idaho, 1, 81 P. 379; Fox v. P., 95 Ill. 71, 75; P. v. Cotton, 250 Ill. 338, 95 N. E. 283; S. v. Van

jury,[38] who still proceed by rules; thus,—

§ 427 a. The Intent is presumed,—to defraud the person whose name is forged, without the testimony of witnesses, from the forgery itself.[39] So is the intent to defraud the one to whom the defendant, with knowledge of the forgery,[40] passed or offered the forged instrument for value.[41]

Auken, 98 Iowa, 674, 68 N. W. 454; S. v. Gavigan, 36 Kan. 322, 13 Pac. 554; Com. v. Ladd, 15 Mass. 526, 529; S. v. Hesseltine, 130 Mo. 468, 32 S. W. 983; P. v. Wiman, 148 N. Y. 29, 42 N. E. 408; P. v. Corrigan, 129 Ap. Div. (N. Y.) 75, 113 N. Y. S. 513; P. v. Stearns, 21 Wend. (N. Y.) 409; Leonard v. S., 29 Ohio St. 408; Wells v. Ter., 1 Okla. Cr. Ap. 469, 98 Pac. 483; Rohr v. S., 60 N. J. L. 576, 38 A. 673; Snell v. S., 2 Humph. (Tenn.) 347; Montgomery v. S., 12 Tex. Ap. 323, 330; Feeney v. S., 58 Tex. Cr. Ap. 152, 124 S. W. 944; S. v. Shelters, 51 Vt. 102, 105, 31 Am. 670; Norton v. S., 129 Wis. 659, 109 N. W. 531, 116 Am. St. 979. An intent to defraud the public, generally is sufficient, McClure v. Com., 86 Pa. Sr. 353, 356; U. S. v. Moses, 4 Wash. C. C. 726, 728, 27 Fed. Cas. 15825; Green v. S., 36 Tex. Cr. 109, 35 S. W. 971; Rohr v. S., 60 N. J. L. 576, 38 Atl. 673. It is not necessary to allege or prove an intent to defraud any particular person. Roush v. S., 34 Neb. 326, 327, 51 N. W. 755; S. v. Hart, 67 Iowa, 142, 25 N. W. 99; P. v. Van Alstyne, 57 Mich. 69; S. v. Blodgett, 143 Iowa, 578, 121 N. W. 685.

38. Gooden v. S., 55 Ala. 178; P. v. Campbell, 125 N. W. 42, 16 Det. Leg. N. 1082, 160 Mich. 108; P. v. Shanley, 196 N. Y. 574, 90 N. E. 1163.

39. Ante, § 422 (2); Henderson v. S., 14 Tex. 503; Hurst v. S., 1 Ala. Ap. 235, 56 So. 18; Williams v. S., 126 Ala. 50, 28 So. 632; S. v. Bjarnaas, 88 Minn. 301, 92 N. W. 980; S. v. Hahn, 38 La. Ann. 169, 172; S. v. Pyscher, 179 Mo. 140, 77 S. W. 836; Phelps v. P., 72 N. Y. 365, 6 Hun (N. Y.) 428; Smith v. S. (Tex. Cr. 1895), 32 S. W. 696; U. S. v. Houghton, 14 Fed. 544, 549. Or from all facts including the defendant's declarations, S. v. Williams, 66 Iowa, 573, 575, 24 N. W. 52; Timmons v. S., 80 Ga. 216, 4 S. E. 766; S. v. Mitton, 37 Mont. 366, 96 Pac. 926, 127 Am. St. 732; Fischl v. S., 54 Tex. Cr. 55, 111 S. W. 410; Spears v. P., 220 Ill. 72, 77 N. E. 112, 4 L. R. A. (N. S.) 402n.

40. Ante, § 425 (1).

41. Ante, § 422 (2); Rex v. Carter, 7 Car. & P. 134; Rex v. Sheppard, Russ. & Ry. 169; Rex v. Crowther, 5 Car. & P. 316; Rex v. James, 7 Car. & P. 553. See Rex v. Harvey, 2 B. & C. 257; Rex v. Birkett, Russ. & Ry. 86; Reg. v. Cooke, 8 Car. & P. 582; Reg. v. Carter, 1 Den. C. C. 65, 1 Cox, C. C. 170, 1 Car. & K. 741; Edwards v. Buchanan, 3 B. & Ad. 788; Rex v. Jones, 2 East P. C. 991; S. v. Kimball, 58 Me. 409; C. v. Starr, 4 Allen, 301; Reg. v. Hanson, Car. & M. 334. It may be presumed that accused forged an instrument from it being found in his possession with proof

In aid of this presumption, or as applicable in cases affording no scope for it, other proofs may be adduced;[42] as,—

§ 428. 1. **Other Instances.**[43]—In forgery, as distinguished from the criminal uttering, it is not permissible to show against the defendant that he has committed or confessed another forgery, or uttered another forged instrument.[44] But on a charge of uttering, or of any other kindred form of the offense, if it becomes necessary to prove his knowledge of the falsity of a writing which he may not have forged himself,[45] other utterings or possessions of like forged instruments are admissible, as explained in the first volume.[46] The fact of such instrument being forgeries

he tried to raise or raised money on it, nothing else appearing. S. v. Peterson, 129 N. C. 556, 40 S. E. 9; Curtis v. S., 118 Ala. 125, 24 So. 111; S. v. Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. 441; S. v. Pyscher, 179 Mo. 140, 77 S. W. 836.

42. P. v. Marion, 29 Mich. 31.

43. Vol. II, §§ 1120-1129.

44. Vol. II, § 1124; P. v. Corbin, 56 N. Y. 363, 15 Am. R. 427; Morris v. S., 8 Sm. & M. 762; Dow v. Spenny, 29 Mo. 386; Reg. v. Moore, 1 Fost. & F. 73; Fox v. P., 95 Ill. 71. See Bluff v. S., 10 Ohio St. 547; Manaway v. S., 44 Ala. 375; Hartford Bank v. Hart, 3 Day, 491, 3 Am. D. 274; S. v. Saunders, 68 Iowa, 370, 27 N. W. 455. Perhaps contra, McDonald v. S., 83 Ala. 46, 3 So. 305; P. v. Bibby, 91 Cal. 470, 27 P. 781; S. v. Cooper, 83 Kan. 385, 111 P. 428; Hinson v. S., 51 Tex. Cr. 102, 100 S. W. 939; P. v. Arlington, 123 Cal. 356, 55 P. 1003; P. v. Bird, 124 Cal. 32, 55 P. 639; P. v. Weaver, 177 N. Y. 444, 69 N. E. 1094; reversing 81 A. D. 567, 81 N. Y. S. 519, 17 N. Y. Cr. 291; Joiner v. S., 46 Tex. Cr. 408, 80 S. W. 531.

45. Ante, § 425 (1). Defendant's possession is not conclusive of his guilty knowledge. He may always prove any facts to show absence of guilty knowledge. Miller v. S., 51 Ind. 405, 406; Fox v. P., 95 Ill. 71, 75; P. v. Everhardt, 104 N. Y. 591, 595, 11 N. E. 62; Crossland v. S., 77 Ark. 357, 92 S. W. 776.

46. Vol. II, §§ 1126-1128; Reg. v. Salt, 3 Fost. & F. 834; McCartney v. S., 3 Ind. 353, 56 Am. D. 510; C. v. Stone, 4 Met. 43; Reg. v. Green, 3 Car. & K. 209; C. v. Miller, 3 Cush. 243; Rex v. Hough, Russ. & Ry. 120; S. v. Brown, 4 R. I. 528, 70 Am. D. 168; Steele v. P., 45 Ill. 152; S. v. Williams, 2 Rich. 418, 45 Am. D. 741; Reed v. S., 15 Ohio, 217; Lindsey v. S., 38 Ohio St. 507. See U. S. v. Roudenbush, Bald. 514; U. S. v. Doebler, Bald. 519; Bluff v. S., 10 Ohio St. 547; Wright v. S., 138 Ala. 69, 34 So. 1009; P. v. Sanders, 114 Cal. 216, 46 Pac. 153; P. v. Harben, 5 Cal. Ap. 29, 91 Pac. 398; Langford v. S., 33 Fla. 233, 242, 14 So. 815; Wooldridge v. S., 49 Fla. 137, 38 So. 3; Anson v. P., 148 Ill. 494, 503, 35 N. E. 145; Juretich v. P., 223 Ill. 484, 79 N. E. 181; Card v. S., 109 Ind. 415, 421, 9

must be shown;[47] and it would seem the time of the utterings should not be too remote,—a question as to which the discretion of the presiding judge is probably the chief guide.[48] Some of the cases reject all utterings subsequent to the one on trial, unless a connection is disclosed between them and it;[49] but the better practice is believed to be, in general, to admit them.[50] Again,—

2. **Conduct,**—such as that the defendant made false representations at the time of uttering,[51] that he fabricated a deposition to prove the forgery genuine,[52] that his statements of the source whence he obtained it were contradic-

N. E. 591; S. v. Chance, 82 Kan. 388, 108 P. 789; Com. v. Russell, 156 Mass. 196, 30 N. E. 763; P. v. Peck, 139 Mich. 680, 103 N. W. 178, 12 Det. Leg. N. 28; S. v. Myers, 82 Mo. 558, 564-570, 52 Am. 389; S. v. Stark, 202 Mo. 210, 100 S. W. 642; S. v. Mitton, 37 Mont. 366, 96 Pac. 926, 127 Am. St. 732; P. v. Everhardt, 104 N. Y. 591, 594, 11 N. E. 62; P. v. Dolan, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. 521; S. v. Murphy, 17 N. Dak. 48, 115 N. W. 84; Strang v. S., 32 Tex. Cr. 219, 22 S. W. 680; Dillard v. U. S., 141 Fed. 303, 72 C. C. A. 451. But compare, S. v. Hathborn, 166 Mo. 229, 65 S. W. 756; Ex parte Glaser, 100 C. C. A. 254, 176 Fed. 702.

47. Rex v. Millard, Russ. & Ry. 245; P. v. Dibble, 3 Abb. Ap. 518; Dibble v. P., 4 Par. Cr. 199; S. v. Cole, 19 Wis. 129, 88 Am. D. 676; Reed v. S., supra.

48. Reg. v. Salt, 3 Fost. & F. 834, 836. And see S. v. Brown, supra; Steele v. P., supra; Rex v. Balls, 1 Moody, 470; McCartney v. S., supra; P. v. Frank, 28 Cal. 507; Bersch v. S., 13 Ind. 434, 74 Am. D. 263; Rex v. Millard, supra; Harding v. S., 54 Ind. 359, 365; Com. v. Coe, 115 Mass. 481, 501; Com. v. White, 145 Mass. 392, 395, 14 N. E. 611; Com. v. Hall, 4 Allen (Mass.) 305, 306; Com. v. Price, 10 Gray (Mass.) 472, 476, 71 Am. Dec. 668n.

49. Rex v. Taverner, Car. Crim. Law (3d Ed.) 195; Dibble v. P., 4 Par. Cr. 199. See P. v. Dibble, 3 Abb. Ap. 518. And see P. v. Wood, 3 Par. Cr. 681; P. v. Stewart, 5 Mich. 243; S. v. Freeman, 4 Jones, N. C. 5; Card v. S., 109 Ind. 415; P. v. Van Alstine, 57 Mich. 69, 23 N. W. 594; S. v. Allen, 56 S. C. 595, 35 S. E. 204.

50. Ante, § 189; Hendrick v. C., 5 Leigh, 707; Rex v. Smith, 4 Car. & P. 411. See Rex v. Smith, 2 Car. & P. 633.

51. Rex v. Sheppard, Russ. & Ry. 169; Gardner v. S., 96 Ala. 12, 11 So. 402; Lascelles v. S., 90 Ga. 347, 16 S. E. 945; S. v. Calkins, 73 Iowa, 128, 34 N. W. 777.

52. S. v. Williams, 27 Vt. 724.

tory,[53] and other like duplicities,[54] may be shown against him. So—

3. **Confessions,**—when sufficiently full,[55] are admissible within the ordinary rules.[56]

4. **Co-conspirator.**—Admissions, other utterings, the possession of other forgeries, and the like, by a co-conspirator with the defendant in the *delictum* on trial,[57] are competent on principles already explained.[58] Again,—

5. **Knowledge**—whereby the defendant could detect the forgery, may be shown against him on a charge of uttering, to create the inference that he knew the instrument to be forged.[59]

§ 429. 1. **As to who may be Witnesses,**—the rules in our first volume for determining the question generally[60] are applicable the same in forgery as in other offenses. Some particulars, are,—

2. **The Person whose Name is forged,**—assumed to have an interest in procuring a conviction, and liable to be sued on the forged instrument, could not by the common law of England be a witness against the indicted forger; unless

53. C. v. Starr, 4 Allen, 301; Perdue v. S., 2 Humph. 494. Evidence that for some time before an alleged forged check was cashed, defendant was without money and immediately thereafter had a good deal of money, is admissible. Walker v. S., 127 Ga. 48, 56 S. E. 113. See, P. v. Smith, 103 Cal. 563, 37 P. 516.

54. Vol. II, § 1249-1254; C. v. Edgerly, 10 Allen, 184; Rex v. Forbes, 7 Car. & P. 224; C. v. Hall, 4 Allen, 305; Lascelles v. S., 90 Ga. 347, 16 S. E. 945.

55. S. v. Knowles, 48 Iowa, 598.

56. Vol. II, §§ 1254a-1262; S. v. Warner, 104 Mich. 337, 62 N. W. 405; P. v. Swetland, 77 Mich. 53, 43 N. W. 779.

57. U. S. v. Craig, 4 Wash. C. C. 729.

58 Vol. II, § 1248 (2); ante, §§ 229, 230; S. v. Spalding, 19 Conn. 233, 237, 48 Am. D. 158; P. v. Thoms, 3 Abb. Ap. 571, 3 Par. Cr. 256; U. S. v. Doebler, Bald. 519; Reg. v. Farley, 1 Den. C. C. 197, 2 Car. & K. 313, 2 Cox C. C. 82; Preston v. S., 40 Tex. Cr. 72, 48 S. W. 581.

59. C. v. Hall, 4 Allen, 305; Rex v. Harris, 7 Car. & P. 429; S. v. Anderson (Del. 1910), 75 A. 1097; Wells v. Ter., 1 Okla. Cr. 469, 98 P. 483; S. v. Williams, 66 Iowa, 573, 24 N. W. 52.

60. Vol. II, §§ 1135-1187.

such interest was removed by a release, then he might be.[61] And this doctrine has had a slight American following.[62] But neither an acquittal nor a conviction in a criminal case is admissible in evidence in a civil, where the parties are different;[63] hence, within the rule as to interest now well established,[64] the person whose name is forged is not, in principle, incompetent;[65] and by the nearly unanimous consent of the American courts, contrary to the old English practice, he is admitted.[66] By some, he is so even though he is to receive a part of a fine to be imposed on conviction[67] others not carrying the concession so far.[68] In England, in 1828, the practice was made what it now is with us, by Stat. 9, Geo. 4, c. 32, § 2, which removed the impediment of interest in forgery cases.[69] Later legislation, English and American, has followed in the same line.

61. 2 East P. C. 993; 2 Hawk. P. C., c. 46, §§ 133-135; Rex v. Rhodes, 2 Stra. 728; Watts's Case, 3 Salk. 172; notes to Rex v. Whiting, 1 Salk. 283; Rex v. Russel, 1 Leach, 8; Caffy's Case, 2 East P. C. 995. See Rex v. Boston, 4 East, 572, 582.

62. S. v. Brunson, 1 Root, 307; S. v. Blodget, 1 Root, 534; Day's note to Rex v. Eden, 1 Esp. 97, citing these two Connecticut cases to the point in my text; S. v. Stanton, 1 Ire. 424, 428 (compare with S. v. Bateman, 3 Ire. 474, and White v. Green, 5 Jones (N. C.) 47. And see Respublica v. Ross, 2 Yeates, 1, 2 Dall. 239); S. v. Hamilton, 2 Hayw. 288.

63. 1 Greenl. Ev., § 537.

64. Vol. II, § 1138; Abrahams v. Bunn, 4 Bur. 2251; Smith v. Prager, 7 T. R. 60.

65. Rex v. Boston, supra; P. v. Howell, 4 Johns. 296.

66. Simmons v. S., 7 Ohio (1st pt.) 116; Pennsylvania v. Farrel, Addison, 246; S. v. Whitten, 1 Hill (S. C.) 100; C. v. Hutchinson, 1 Mass. 7; C. v. Snell, 3 Mass. 82; C. v. Waite, 5 Mass. 261; C. v. Peck, 1 Met. 428; P. v. Dean, 6 Cow. 27; Respublica v. Weight, 1 Yeates, 401; Respublica v. Keating, 1 Dall. 110; Pope v. Nance, 1 Stew. 354, 18 Am. D. 60; P. v. Howell, 4 John . 296; S. v. Phelps, 11 Vt. 116, 34 Am. D. 672; S. v. Shurtliff, 18 Me. 368; Anson v. P., 148 Ill. 494, 505, 35 N. E. 145; S. v. Bateman, 3 Ired. (N. Car.) 474, 476; S. v. Hooper, 2 Bailey (S. C.) 37, 40; Simmons v. S. (Tex. Cr. 1895), 32 S. W. 532; McGlasson v. S., 37 Tex. Cr. 620, 40 S. W. 503, 66 Am. St. 842; Chappell v. S., 58 Tex. Cr. 401, 126 S. W. 274.

67. Noble v. P., Breeze, 29.

68. S. v. A. W., 1 Tyler, 260. See Bradley v. Couch, 1 Root, 361; S. v. Brunson, 1 Root, 307; S. v. Blodget, 1 Root, 534; S. v. Nettleton, 1 Root, 308.

69. The following collection of English cases prior to this statute may occasionally be helpful; yet to occupy space with a full digest of them would not be profitable: Rex

§ 430. 1. **Even a Subscribing Witness**—need not be called; for the proof may be as well by the person whose name is forged.[70] Or,—

2. **Where the Forged Writing is destroyed,**—such person may testify both to the destruction and the forgery of it, though there are pending against him civil suits to which the forgery is the only defense. The judgment in the criminal case could not be given in evidence in the civil.[71] Within this principle,—

§ 431. 1. **Bank Officers**—may be witnesses to the falsity of paper purporting to be their bills.[72] But they are not indispensable though within reach of process; for—

2. **Other Persons**—are also competent witnesses thereto.[73] And—

v. Russel, 1 Leach, 8; Rex v. Crocker, Russ. & Ry. 97, 2 New Rep. 87, 2 Leach, 987; Rex v. Smith, 2 East P. C. 1000, 1 Leach, 333, note; Rex v. Rhodes, 1 Leach, 24; Thornton's Case, 2 Leach, 634; Rex v. Testick, 2 East P. C. 1000; Rex v. Wells, 2 East P. C. 1000; Rex v. Dodd, 1 Leach, 155; Rex v. Parr, 1 Leach, 434, 438; Rex v. Wait, Russ. & Ry. 505, 7 Moore, 473, 1 Bing. 121, 11 Price, 518; Rex v. Pigeon, 1 Car. & P. 98; Rex v. Treble, Russ. & Ry. 164; Rex v. Usher, 1 Leach, 48, 2 East P. C. 999; Rex v. Akehurst, 1 Leach, 150, 2 East P. C. 1003; Rex v. Taylor, 1 Leach, 214, 2 East P. 960; Rex v. Sponsonby, 1 Leach, 332, 2 East P. C. 996; Rex v. Mott, Russ. & Ry. 435; Rex v. Young, Russ. & Ry. 281, note; Rex v. Peacock, Russ. & Ry. 278.

70. Simmons v. S., 7 Ohio (1st pt.) 116.

71. C. v. Peck, 1 Met. 428. A distinction recognized in Pennsylvania is that the apparent maker of a forged note may testify to the forgery; but not a bona fide indorser, unless he has paid the note. Respublica v. Ross, 2 Yeates, 1, 2 Dall. 239.

72. Rex v. Newland, 1 Leach, 311, 2 East P. C. 1001; Bank Prosecutions, Russ & Ry. 378; Foulkes v. S., 2 Rob. Va. 836.

73. Rex v. Hughes, 2 East P. C. 1002, 1 Leach, 311, note; S. v. Stalmaker, 2 Brev. 1; S. v. Lawrence, Brayt. 78; Faulkes v. C., 2 Rob. (Va.) 836; S. v. Anderson, 2 Bailey, 565; Bank Prosecutions, Russ. & Ry. 378; Hess v. S., 5 Ohio, 5, 22 Am. D. 767; Johnson v. S., 35 Ala. 370; Martin v. C., 2 Leigh, 745; Clark v. S., 14 Ind. 26; S. v. Carr, 5 N. H. 367; S. v. Cheek, 13 Ire. 114; S. v. Farrington, 90 Iowa, 673, 57 N. W. 606; Com. v. Smith, 6 S. & R. (Pa.) 568, 570; S. v. Henderson, 29 W. Va. 147, 1 S. E. 225.

3. **To other Writings,**—signed by private individuals, the same rule applies.[74]

4. **Doctrine qualified—(Primary and Secondary Evidence).**—By the better opinion, this doctrine needs no qualification.[75] Yet some courts appear to regard the testimony of third persons as secondary evidence, admissible only after the absence of those whose names are alleged to be forged is accounted for.[76] There is no solid ground for this distinction. Men often mistake forgeries for their own writings; and a witness who testifies to what purports to be his speaks only from opinion, unless the the paper has been constantly in his manual possession. Such a witness, therefore, occupies precisely the same position as a third person who, too, is familiar with the subject. In the average instance, his judgment will be better informed than the third person's; but there are men who can tell the handwriting of some others better than the latter can tell it themselves.

§ 432. **The Proof of any Handwriting,**—therefore, which no one remembers to have seen written, is a question of opinion. It is for the jury;[77] who, on an indictment for forging the writing, must, to convict, starting with the presumption that it is genuine,[78] be convinced by the evidence beyond a reasonable doubt that it is not.[79] The common methods of proof, always permissible, are—

§ 432 a. **Witness to Opinion.**—An opinion, to be admissible, must like any other evidence be based on knowledge. And any one who, from having seen another write,[80] even

74. Foulkes v. C., supra; Henderson v. S., 14 Tex. 503. And see Ainsworth v. Greenlee, 1 Hawks, 190.

75. Lefferts v. S., 20 Vroom, 26.

76. S. v. Hopper, 2 Bailey, 37; S. v. Tutt, 2 Bailey, 44, 21 Am. D. 508; S. v. Petty, Harper, 59; C. v. Taylor, 5 Cush. 605; C. v. Carey, 2 Pick. 47. See Haun v. S., 13 Tex. Ap. 383.

77. Mosher v. S., 14 Ind. 261.

78. C. v. Stow, 1 Mass. 54.

79. Vol. II, §§ 1091-1095.

80. Magee v. Osborn, 32 N. Y. 669; Commissioners v. Hanlon, 1 Nott & McC. 554; Hopkins v. Megquire, 35 Me. 78; Hartung v. P., 4 Par. Cr. 319; Lewis v. Sapio, Moody & M. 39; Eagleton v. Kingston, 8 Ves. 438, 473.

but once,[81] or from corresponding with him,[82] or from any other opportunity or means, though never seeing him write,[83] has acquired some knowledge of his handwriting,[84] the amount of which knowledge and the consequent weight of the testimony will vary with the cases,[85] may give in evidence his opinion whether or not a writing in controversy came from the hand of such person. On principle, and probably on authority, the presiding judge is to determine, as a mixed question of law and fact, whether or not the witness tendered has the necessary knowledge; then, if he is admitted, the jury are to give his evidence the weight they deem just.[86] And as to what is adequate in knowledge or opportunity, the cases are probably not absolutely harmonious.[87] Not always will what the witness has learned pend-

81. Warren v. Anderson, 8 Scott, 384; Willman v. Worrall, 8 Car. & P. 380; Garrells v. Alexander, 4 Esp. 37; Edelen v. Gough, 8 Gill, 87; Woodford v. McClenahan, 4 Gilman, 85; Bowman v. Sanborn, 5 Fost. (N. H.) 87; C. v. Nefus, 135 Mass. 533.

82. U. S. v. Simpson, 3 Pa. (P. & W.) 437; Johnson v. Daverne, 19 Johns. 134, 10 Am. D. 198; Tharpe v. Gisburne, 2 Car. & P. 21; Harrington v. Fry, 1 Car. & P. 289, 9 Moore, 344; Rex v. Slaney, 5 Car. & P. 213; Gould v. Jones, 1 W. Bl. 384; Clark v. Freeman, 25 Pa. 133; Southern Express Co. v. Thornton, 41 Miss. 216; Chaffee v. Taylor, 3 Allen, 598; Van Dusen v. Van Dusen, 5 Johns. 144.

83. Hammond's Case, 2 Greenl. 33, 11 Am. D. 39; S. v. Spence, 2 Harring. (Del.) 348; Hess v. S., 5 Ohio, 5, 22 Am. D. 767; Smith v. Sainsbury, 5 Car. & P. 196; Mudd v. Suckermore, 5 A. & E. 703; Cabarga v. Seeger, 17 Pa. 514; U. S. v. Cases of Champagne, 1 Ben. 241; Reid v. Hodgson, 1 Cranch C. C. 491; Page v. Homans, 14 Me. 478; Burnham v. Ayer, 36 N. H. 182; Amherst Bank v. Root, 2 Met. 522; Rayburn v. Belotti, 10 Mo. 597; Tuttle v. Rainey, 98 N. C. 513. Contra, Rex v. Culpepper, Holt, 293.

84. Dubois v. Baker, 30 N. Y. 355; Pope v. Askew, 1 Ire. 16, 35 Am. D. 729; First National Bank of Omaha v. Lierman, 5 Neb. 247; Taylor v. Sutherland, 24 Pa. 333; S. v. Minton, 116 Mo. 605, 22 S. W. 808.

85. Hartung v. P., supra; Mudd v. Suckermore, supra. One who has not acquired this knowledge, though he has seen the person write, is not a competent witness. Putnam v. Wadley, 40 Ill. 346; Brigham v. Peters, 1 Gray, 139; Nelms v. S., 91 Ala. 97. One who has acquired it is competent, though he cannot himself read or write. Foye v. Patch, 132 Mass. 105.

86. Vol. II, §§ 979, 989, 989a, 1147, 1169, 1212, 1236, 1241, 1244.

87. See, and compare, Shitler v. Brewer, 23 Pa. 413; Haynie v. S., 2 Tex. Ap. 168; U. S. v. Johnson, 1

ing the controversy entitle him to testify,[88] but sometimes it will; the test, as stated by Lumpkin, J. being, whether or not the circumstances show a motive to disguise the hand.[89]

§ 432 b. **Comparison of Hands.**—Where the question is whether or not the defendant wrote a particular instrument or signature, other writings, being in the case for the other purposes of the trial, and conceded to be his, may be brought into juxtaposition and compared with the one in controversy, as a help to the jury in their finding; because, as expressed by Stone, J. they will make the comparison, and the safer course is "to adopt it as a principle, and thus give to the presiding judge the right to instruct" them in the rules to be observed therein.[90] But no writing will be admitted in evidence for the mere purpose of comparison.[91]

Cranch C. C. 371; Cochran v. Butterfield, 18 N. H. 115, 45 Am. D. 363; Hoitt v. Moulton, 1 Fost. (N. H.) 586; Mapes v. Leal, 27 Tex. 345; Allen v. S., 3 Humph. 367; S. v. Carr, 5 N. H. 367; S. v. Brown, 4 R. I. 528, 70 Am D. 168; S. v. Allen, 1 Hawks, 6, 9 Am. D. 616; S. v. Candler, 3 Hawks, 393; Jones v. Finch, 37 Miss. 461, 75 Am. D. 73; S. v. Harris, 5 Ire. 287; Gordon v. Price, 10 Ire. 385; Pope v. Askew, 1 Ire. 16.

88. Stranger v. Searle, 1 Esp. 14, 15.

89. Reid v. S., 20 Ga. 681, 683. And see Keith v. Lothrop, 10 Cush. 453.

90. Bishop v. S., 30 Ala. 34, 41, 42; S. v. Scott, 45 Mo. 302; Moore v. U. S., 91 U. S. 270; Ellis v. P., 21 How. Pr. 356; Henderson v. Hackney, 16 Ga. 521; Williams v. Drexel, 14 Md. 566; Rogers v. Shaler, Anthon, 109; Van Wyck v. McIntosh, 4 Kern. 439; Rex v. Morgan, 1 Moody & R. 134, note; Perry v. Newton, 1 Nev. & P. 1, 5 A. & E. 514; Griffith v. Williams, 1 Cromp. & J. 47; Hatch v. S., 6 Tex. Ap. 384; P. v. Parker, 67 Mich. 222, 11 Am. St. 578, 34 N. W. 720; Miles v. Loomis, 75 N. Y. 288, 31 Am. R. 470. See S. v. Dennett, 19 La. An. 395. Contra, Outlaw v. Hurdle, 1 Jones (N. C.) 150; Otey v. Hoyt, 3 Jones (N. C.) 407. As to photographs of genuine writings see S. v. Ready, 77 N. J. L. 329, 72 A. 445.

91. Ib.; S. v. Givens, 5 Ala. 747; S. v. Fritz, 23 La. Ann. 55; Reg. v. Wilton, 1 Fost. & F. 391, 392; Reg. v. Aldridge, 3 Fost. & F. 781; Hoyt v. Stuart, 3 Bosw. 447; P. v. Spooner, 1 Denio, 343, 43 Am. D. 672; Reg. v. Shepherd, 1 Cox C. C. 237; Putnam v. Wadley, 40 Ill. 346; Jumpertz v. P., 21 Ill. 375; U. S. v. Prout, 4 Cranch C. C. 301; Woodard v. Spiller, 1 Dana, 179, 25 Am. D. 139; U. S. v. Craig, 4 Wash. C. C. 729; Knap v. Sacket, 1 Root, 501; Little v. Beazley, 2 Ala. 703, 36 Am. D. 431; Kernin v. Hill, 37 Ill. 209; Shank v. Batsch, 28 Ill. 19;

In England it is now otherwise by the statute of 28 & 29 Vict., c. 18, § 1, 8, which permits such "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine." [92] There is some American legislation of the like sort,[93] and in Massachusetts [94] and Maine [95] the same is allowed on common law principles. And there are relaxations of the strict rule in some of the other States.[96]

Pierce v. Northey, 14 Wis. 9; Burr v. Harper, Holt, N. P. 420; Griffits v. Ivery, 11 A. & E. 322; Macferson v. Thoytes, Peake, 20; Rowt v. Kile, 1 Leigh, 216; S. v. Clinton, 67 Mo. 380, 29 Am. R. 506; S. v. Koontz, 31 W. Va. 127, 5 S. E. 328; Berryhill v. Kirchner, 96 Pa. 489; Jones v. S., 60 Ind. 241; S. v. Owen, 73 Mo. 440; P. v. Parker, 67 Mich. 222, 11 Am. St. 578, 34 N. W. 720; S. v. Miller, 47 Wis. 530, 3 N. W. 31. See Roe v. Roe, 40 N. Y. Super. 1; Bennett v. Mathews, 5 S. C. 478; P. v. Hewit, 2 Par. Cr. 20; S. v. Brunson, 1 Root, 307; S. v. Nettleton, 1 Root, 308; Smith v. Fenner, 1 Gallis. 170; Welch v. Gould, 2 Root, 287; Manaway v. S., 44 Ala. 375; P. v. Creegan, 121 Cal. 554, 53 Pac. 1082; Vinton v. Peck, 14 Mich. 287, 293, 294; P. v. Parker, 67 Mich. 222, 224, 34 N. W. 720, 11 Am. St. 578; S. v. Stark, 202 Mo. 210, 100 S. W. 642; Merritt v. Campbell, 79 N. Y. 625; Hynes v. McDermott, 82 N. Y. 41, 52, 37 Am. 538; P. v. Schooley, 149 N. Y. 99, 43 N. E. 536; U. S. v. North (D. C.), 184 Fed. 151; S. v. Ezekiel, 33 S. Car. 115, 116, 11 S. E. 635; Johnson v. Com., 102 Va. 927, 46 S. E. 789; S. v. Fillpot, 51 Wash. 223, 98 Pac. 659; Moore v. U. S., 91 U. S. 270, 274, 23 L. Ed. 346; Johnson v. S. (Tex. 1907), 102 S. W. 1133.

92. And see 3 Russ. Crimes (5th Eng. Ed.), 437; Archb. Crim. Pl. & Ev. (19th Ed.) 294; Wilson v. Thornburg (Law Rep.), 17 Eq. 517.

93. Hyde v. Woolfolk, 1 Iowa, 159; Baker v. Mygatt, 14 Iowa, 131.

94. Horner v. Wallis, 11 Mass. 309, 312; C. v. Eastman, 1 Cush. 189, 217, 218, 48 Am. D. 596; Moody v. Rowell, 17 Pick. 490, 495, 28 Am. D. 317; Martin v. Maguire, 7 Gray, 177.

95. Chandler v. Le Barron, 45 Me. 534; Hammond's Case, 2 Greenl. 33, 11 Am. D. 39; S. v. Thompson, 80 Me. 194, 6 Am. St. 172. And see Sweetser v. Lowell, 33 Me. 446.

96. S. v. Ward, 39 Vt. 225; Depue v. Place, 7 Pa. 428; Baker v. Haines, 6 Whart. 284, 36 Am. D. 224; Cantey v. Platt, 2 McCord, 260; Adams v. Field, 21 Vt. 256; Gifford v. Ford, 5 Vt. 532; Desbrow v. Farrow, 3 Rich. 382; U. S. v. Larned, 3 Cranch C. C. 312; Hopkins v. Simmons, 1 Cranch C. C. 250; Lyon v. Lyman, 9 Conn. 55; Jones v. S., 7 Tex. Ap. 457; Long v. S., 10 Tex. Ap. 186; Phillips v. S., 6 Tex. Ap. 364; Pontius v. P., 21 Hun, 328; P. v. Parker, 67 Mich. 222, 228, 34 N. W. 720, 11 Am. St. 578; S. v. Barris, 78 N. J. L. 14, 73 A. 248.

§ 432 c. Experts—may also aid the proofs. It is deemed that not great reliance should be placed on their evidence,[97] and some judges have even inclined to reject it altogether.[98] But with minor differences in details, its admissibility is now well established; as, where a comparison of writings is permitted to the jury,[99]—not where it is not,[1]—an expert in handwriting may express to them his opinion of the result to which it should lead, with the reasons therefor.[2] So,

97. 1 Greenl. Ev., §§ 580, note. Non-experts who know the writing of the person whose name was forged may testify. S. v. Goldstein, 74 N. J. L. 598, 62 Atl. 1006; De La Motte's Case, 21 How. St. Tr. 564, 810; S. v. Gay, 94 N. Car. 815, 819; S. v. Stair, 87 Mo. 268, 56 Am. 449; S. v. Farrington, 90 Iowa, 673, 57 N. W. 606; S. v. Minton, 116 Mo. 665, 22 S. W. 808; Com. v. Smith, 6 S. & R. (Pa.) 568, 571; Thomas v. S., 103 Ind. 419, 429, 2 N. E. 808; Redd v. S., 65 Ark. 475, 47 S. W. 119; S. v. Freshwater, 30 Utah, 442, 85 Pac. 447, 116 Am. St. 853; Bess v. Com., 118 Ky. 858, 82 S. W. 576, 26 Ky. L. 839; Rinker v. U. S., 151 Fed. 755, 81 C. C. A. 379; S. v. Goldstein, 72 N. J. L. 336, 62 Atl. 1003; S. v. Simmons, 52 Wash. 132, 100 Pac. 269; Com. v. Meeham, 170 Mass. 362, 49 N. E. 648; S. v. Olds, 217 Mo. 305, 116 S. W. 1080; Wooldridge v. S., 49 Fla. 137, 38 So. 3; May v. S., 14 Ohio, 461, 45 Am. D. 548; U. S. v. Keen, 1 McLean (U. S.), 429, 26 Fed. Cas. 15510; P. v. Caryl, 12 Wend. (N. Y.) 547; Com. v. Carey, 2 Pick. (Mass.) 47.

98. P. v. Spooner, 1 Denio, 343, 43 Am. D. 672.

99. P. v. Gale, 50 Mich. 237, 15 N. W. 99.

1. U. S. v. Prout, 4 Cranch C. C. 301. See Daniel v. Toney, 2 Met. (Ky.) 523; Niller v. Johnson, 27 Md. 6; Bank of Pennsylvania v. Haldeman, 1 Pa. (R. P. & W.) 161; Lodge v. Phipher, 11 S. & R. 333; Power v. Frick, 2 Grant (Pa.) 306.

2. Moody v. Rowell, 17 Pick. 490, 28 Am. D. 317; Miles v. Loomis, 10 Hun, 372; Speiden v. S., 3 Tex. Ap. 156, 159; C. v. Pettes, 114 Mass. 307; Hawkins v. Grimes, 13 B. Monr. 257; Hicks v. Person, 19 Ohio, 426; Calkins v. S., 14 Ohio St. 222; Withee v. Rowe, 45 Me. 571; C. v. Webster, 5 Cush. 295, 52 Am. D. 711; S. v. Shinborn, 46 N. H. 497, 88 Am. D. 224; West v. S., 2 Zab. 212; Fulton v. Hood, 34 Pa. 365, 75 Am. D. 664; S. v. Thompson, 80 Me. 194, 6 Am. St. 172, 13 A. 892; U. S. v. Chamberlain, 12 Blatch. 390; S. v. Bibby, 91 Cal. 470, 476, 27 Pac. 781; P. v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. 50; S. v. Calkins, 73 Iowa, 128, 131, 34 N. W. 777; S. v. Farrington, 99 Iowa, 673, 57 N. W. 606; S. v. Ryno, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303n; P. v. Hutchings, 137 Mich. 527, 100 N. W. 753; S. v. David, 131 Mo. 380, 33 S. W. 28; S. v. Skillman, 26 N. J. L. 464, 70 Alt. 83; Mallory v. S., 37 Tex. Cr. 482, 36 S. W. 751, 66 Am. St. 808; Johnson v. S. (Tex. Cr. 1907), 102 S. W. 1133; Warren v. S., 54 Tex. Cr. 443, 114 S. W. 380; S. v. Webb, 18 Utah, 441, 56 Pac.

also, to various other questions this sort of testimony is admissible; but, the rules regulating it being the same in criminal causes as in civil, a further discussion of particulars is not advisable here.[3]

§ 433. 1. **The Forged Instrument must be produced**— and put in evidence before evidence of the forgery will be admitted at the trial,[4] or its non-production be justified from necessity, as by showing that it is lost or destroyed.[5] or not within reach of the process of the court,[6] or is in

159; S. v. Phair, 48 Vt. 366; Rinker v. U. S., 151 Fed. 755, 81 C. C. A. 379; S. v. Ready, 77 N. J. L. 329, 72 A. 445.

3. Rex v. Cator, 4 Esp. 117, 145; Reg. v. Williams, 8 Car. & P. 434; Jones v. S., 11 Ind. 357; Johnson v. S., 35 Ala. 370; Pate v. P., 3 Gilman, 644; Johnson v. S., 2 Ind. 652; Goldstein v. Black, 50 Cal. 462; Phoenix Fire Ins. Co. v. Philip, 13 Wend. 81; Thayer v. Chesley, 55 Me. 393; Revett v. Braham, 4 T. R. 497; Gurney v. Langlands, 5 B. & Ald. 330; Goods of Hindmarsh (Law Rep.), 1 P. & M. 307; Bacon v. Williams, 13 Gray, 525; Vinton v. Peck, 14 Mich. 287; Swan v. O'Fallon, 7 Mo. 231; S. v. Shinborn, 46 N. H. 497; U. S. v. McMillan, 29 Fed. Rep. 247; Hooper v. S., 30 Tex. Ap. 412; Gross v. S., 62 Md. 179; S. v. Lurch, 12 Ore. 99, 6 P. 408; Burress v. C., 27 Grat. 934; Frances v. S., 7 Tex. Ap. 501; U. S. v. Mullaney, 32 Fed. Rep. 370; Williams v. S., 61 Ala. 33; P. v. Schick, 75 Mich. 592. See P. v. Brotherton, 47 Cal. 388.

4. S. v. Blodget, 1 Root, 534; S. v. Orsborn, 1 Root, 152; U. S. v. Britton, 2 Mason, 464; Mannaway v. S., 44 Ala. 375; S. v. Tompkins, 71 Mo. 613; Dovalina v. S., 14 Tex. Ap. 312. See Caston v. S., 31 Tex. Cr. 304, 20 S. W. 585; Butler v. S., 22 Ala. 43; P. v. Gordon, 13 Cal. Ap. 678, 110 P. 469; S. v. Breckenridge, 67 Iowa, 204, 25 N. W. 130; P. v. Swetland, 77 Mich. 53, 43 N. W. 779; Haun v. S., 13 Tex. Ap. 383, 387, 44 Am. 706.

5. Reg. v. Hall, 12 Cox C. C. 159, 2 Eng. Rep. 212; S. v. Ford, 2 Root, 93; Pendleton v. C., 4 Leigh, 694, 26 Am. D. 342; C. v. Snell, 3 Mass. 82; C. v. Hutchinson, 1 Mass. 7; Mead v. S., 24 Vroom, 601; Deal v. S., 96 Miss. 82, 50 So. 495; S. v. Potts, 9 N. J. L. 20, 17 Am. Dec. 449; Mead v. S., 53 N. J. L. 601, 605, 23 Atl. 264; S. v. Davis, 69 N. Car. 313, 317; S. v. Peterson, 129 N. C. 556, 40 S. E. 9; Henderson v. S., 14 Tex. 503, 511; Thornley v. S., 36 Tex. Cr. 118, 34 S. W. 264, 61 Am. St. 837; S. v. Allen, 56 S. C. 495, 35 S. E. 204; S. v. Martin, 229 Mo. 620, 129 S. W. 881; Bobbit v. S., 59 Tex. Cr. 314, 128 S. W. 1104; Muniz v. S., 59 Tex. Cr. 365, 128 S. W. 1104; see, Cross v. P., 192 Ill. 291, 61 N. E. 400.

6. Reed v. S., 15 Ohio, 217; S. v. Cole, 19 Wis. 129, 88 Am. D. 678. See Taylor v. Sheppard, 1 Y. & Col. 280.

the possession of the defendant.[7] And in the last instance, not in the others, reasonable notice must have been given him to produce it.[8]

2. **Where a Third Person,**—within the process of the court, has the instrument, the familiar methods of getting possession of it for the purposes of the trial must be employed, or it cannot be treated as inaccessible.[9] But if, on the ground that it is privileged,[10] or otherwise,[11] this person is properly excused from producing it, the case is the same as though it were lost or destroyed. Thereupon,—

§ 434. **The Contents of the Instrument,**—in any of these ways absent from the trial, must still be proved, yet necessarily by secondary evidence;[12] as, by a copy from the records,[13] by a photograph[14] or otherwise,[15] or by the original unexecuted draft.[16] If the writing was also not before the grand jury, and they could set out in the indictment only its substance,[17] this will suffice too at the trial. But if it

7. Ross v. Bruce, 1 Day, 100; Morton v. S., 30 Ala. 527; U. S. v. Doebler, Bald. 519; Henderson v. S., 14 Tex. 503; S. v. Saunders, 68 Iowa, 370, 27 N. W. 455; S. v. Flanders, 118 Mo. 227, 237, 239, 23 S. W. 1086; S. v. Potts, 9 N. J. L. 26, 17 Am. Dec. 449; Devere v. S., 5 Ohio Cir. Ct. 509; Johnson v. S., 9 Tex. Ap. 249, 259; Rollins v. S., 21 Tex. Ap. 148, 152, 17 S. W. 466; S. v. Lowry, 42 W. Va. 205, 24 S. E. 561.

8. Rex v. Haworth, 4 Car. & P. 254; S. v. Kimbrough, 2 Dev. 431; S. v. Cole, supra; U. S. v. Doebler, supra; Rex v. Hunter, 4 Car. & P. 128; Foulkes v. C., 2 Rob. (Va.) 836; S. v. Tucker (Tex. 1911), 137 S. W. 870; S. v. Martin, 229 Mo. 620, 129 S. W. 881, but see, P. v. Swetland, 77 Mich. 53, 43 N. W. 779.

9. Morton v. S., 30 Ala. 527.

10. Reg. v. Tylney, 1 Den. C. C. 319; Reg. v. Hayward, 2 Car. & K. 234; Reg. v. Avery, 8 Car. & P. 596; Reg. v. Jones, 1 Den. C. C. 166. See Reg. v. Farley, 1 Den. C. C. 197; Rex v. Brewer, 6 Car. & P. 363.

11. Rex v. Hunter, 3 Car. & P. 591.

12. S. v. Kimbrough, 2 Dev. 431; Rex v. Hunter, 3 Car. & P. 591; Pendleton v. C., 4 Leigh, 694, 26 Am. D. 342; P. v. Cotton, 250 Ill. 338, 95 N. E. 283.

13. Henderson v. S., 14 Tex. 503; Thompson v. S., 30 Ala. 28; S. v. Ford, 2 Root (Conn.), 93; Com. v. Snell, 3 Mass. 82, 86; Pendleton's Case, 4 Leigh (Va.), 694, 25 Am. Dec. 342.

14. Duffin v. P., 107 Ill. 113, 47 Am. R. 431.

15. U. S. v. Britton, 2 Mason, 464; C. v. Snell, 3 Mass. 82.

16. Rex v. Hunter, 4 Car. & P. 128.

17. Ante, § 404.

is alleged by its tenor, such tenor must be proved, equally where it is not produced as where it is, or there can be no conviction.[18]

§ 435. **Though not in the Maker's Handwriting,**—the instrument or the signature to it may still be genuine; the writer having been authorized.[19] But where execution by procuration does not appear on its face, and all is shown to have been the work of the defendant, and no evidence of his authority or other justification appears, forgery may be presumed,[20] especially in a case of uttering accompanied by falsehood or other inculpatory circumstances.[21]

§ 436. **Other Forms of Evidence**—are multitudinous; as,—

1. **Presumed.**—If a genuine writing is traced to the defendant, and shown to have come thence mutilated, the jury may presume he did it, but they are not to be required to by instruction.[22] So one's possession of a forged instrument, and his claiming under it, tends to prove the forgery his.[23]

2. **That no such person existed**—as represented may be pertinently shown in various circumstances.[24]

18. Rex v. Hunter, supra; Thompson v. S., 30 Ala. 28; U. S. v. Britton, 2 Mason, 464; S. v. Potts, 4 Halst. 26, 17 Am. D. 449. The evidence of a stenographer that she made the copy of a lost instrument from the original handed her for that purpose, that she compared it by reading first the original and then the copy to the state's attorney and that the copy was true and correct is sufficient proof to admit the copy. Cross v. P., 192 Ill. 291, 61 N. E. 400.

19. New Crim. Law, II, § 579 (1); Norwich University v. Denny, 47 Vt. 13.

20. Schroeder v. Harvey, 75 Ill. 638. See Garrett v. Gonter, 42 Pa. 143.

21. Reg. v. Hurley, 2 Moody & R. 473; Rex v. Hampton, 1 Moody, 255. But see contra, S. v. Swan, 60 Kan. 461, 56 P. 750; P. v. Lundin, 117 Cal. 124, 48 P. 1024; Romans v. S., 51 Ohio, 528, 37 N. E. 1040; P. v. Mitchell, 92 Cal. 590, 28 P. 597.

22. S. v. Flye, 26 Me. 312; Reg. v. James, 4 Cox C. C. 90. See Pennsylvania v. Misner, Addison, 44.

23. C. v. Talbot, 2 Allen, 161. See Pearson v. S., 55 Ga. 659; Miller v. S., 51 Ind. 405; S. v. Outs, 30 La. Ann. 1155; Telfair v. S., 56 Fla. 104, 47 So. 863.

24. Rex v. Backler, 5 Car. & P. 118; Rex v. King, 5 Car. & P. 123; C. v. Costello, 119 Mass. 214; Reg. v. White, 2 Fost. & F. 554; Rex v.

3. **Capacity**—to commit the crime, such as skill in imitating the peculiarities of signatures, cannot, unless in rebuttal of evidence of incapacity, or by reason of some other special condition of the proofs, be shown against the defendant.[25]

III. *The Indictment and Evidence in Particular Forms of Offending and of Law.*

§ 437. 1. **In this Sub-title**,—we shall not consider over again what has gone before, but call to mind some particulars relating to statutory forgeries, and forgeries, utterings, and the criminal possession of forged bank-bills, mercantile paper, and the like.

Brannan, 6 Car. & P. 326; Thompson v. S., 49 Ala. 16; Maloney v. S., 91 Ark. 485, 121 S. W. 728; Lascelles v. S., 90 Ga. 347, 16 S. E. 945, 35 Am. St. 216; S. v. Bauman, 52 Iowa, 68, 2 N. W. 956; Com. v. Costello, 120 Mass. 358, 370; P. v. Warner, 104 Mich. 337, 62 N. W. 405, 406; S. v. Minton, 116 Mo. 605, 610, 22 S. W. 808; S. v. Vineyard, 16 Mont. 138, 40 Pac. 173, 175; P. v. Browne, 189 N. Y. 528, 82 N. E. 1130; S. v. Covington, 94 N. Car. 913, 55 Am. 650n; Peete v. S., 2 Lea (Tenn.), 513; Brewer v. S., 32 Tex. Cr. 74, 22 S. W. 41, 40 Am. St. 760; Davis v. S., 34 Tex. Cr. 117, 29 S. W. 478; Johnson v. S., 35 Tex. Cr. 271, 33 S. W. 231; Lasister v. S., 49 Tex. Cr. 532, 94 S. W. 233; Ex parte Hibbs, 26 Fed. 421, 423; Logan v. U. S., 123 Fed. 291, 59 C. C. A. 476; Rex v. Bolland, 1 Leach, C. C. 97. Residents of a place may testify they never heard of the person whose name is alleged to be fictitious. S. v. Hahn, 38 La. Ann. 169, 172. One who has searched for him may state what he did, that he inquired and got no information in answer to his questions. P. v. Sharp, 53 Mich. 523, 525, 19 N. W. 168; P. v. Jones, 106 N. Y. 523, 526, 13 N. E. 93. But subpoenas for the persons who signed alleged forged indictments, with the returns, showing they could not be found are inadmissible. Taylor v. S. (Tex. 1906), 97 S. W. 474.

25. S. v. Hopkins, 50 Vt. 316; Dow v. Spenny, 29 Mo. 386.

Other evidence.—For some other questions of evidence, see Rex v. Huet, 2 Leach, 820; Farrington v. S., 10 Ohio, 354; Pagaud v. S., 5 Sm. & M. 491; Sands v. C., 20 Grat. 800; Wiggins v. S., 1 Lea, 738; Rex v. Buttery, Russ. & Ry. 342; Rex v. Gibson, Russ. & Ry. 343, note; Henderson v. S., 14 Tex. 503; Van Sickle v. P., 29 Mich. 61; C. v. Butterick, 100 Mass. 12; Rex v. Wait, 7 Moore, 473, 1 Bing. 121, 11 Price, 518; S. v. Foster, 3 McCord, 442; Rex v. Hevey, 1 Leach, 232; P. v. Parker, 67 Mich. 222, 11 Am. St. 578, 34 N. W. 720; P. v. Sanders, 114 Cal. 216, 46 Pac. 153; Langdon v. P., 133 Ill. 382, 394, 24 N. E. 874.

First. *Where the Indictment is on a Statute:—*

2. **The Foregoing Elucidations**—are largely of statutory proceedings. But—

A General Form of Indictment—on a statute is to allege that on, etc., at, etc., the defendant "feloniously [where the offense is felony] did forge a certain [here name the instrument], which said forged ——— is as follows [here set out the instrument *verbatim*], with intent to defraud one B, against," etc.[26]

3. **Other Counts**—may be added charging the forging as an alteration, or for uttering, and the like, as may appear practically best. The statutes, and the principles explained in the first volume, should be carefully considered together. Under some statutes, a forgery and uttering are but different grades of one offense, so that both may be charged in one count.[27] Under others, they are two distinct offenses, and they can be joined only in separate counts.[28]

§ 438. **Where "forge or cause to be forged"**—are the statutory words, they in the indictment, with the disjunctive "or," will be ill.[29] But "and"[30] may be substituted; or "cause to be forged" omitted, even though the forging was by agent.[31]

§ 439. 1. **The Name of the Forged Instrument,**—as appearing in the statute, though probably it need not be given where the full tenor is,[32] must be stated correctly if at all.[33] Therefore if the statute has several names united disjunctively, it will not ordinarily be prudent to employ more

26. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 355, (19th Ed.) 609. Compare with Dir. & F. §§ 460, 461.

27. Thomas v. S., 59 Ga. 784.

28. S. v. Snow, 30 La. Ann. 401. See P. v. Frank, 28 Cal. 507; S. v. Morton, 27 Vt. 310, 65 Am. D. 201; S. v. Keeter, 80 N. C. 472; Barton v. S., 23 Wis. 587; U. S. v. Nelson, 1 Abb. U. S. 135. And compare with Dir. & F. §§ 462-480. See post, § 481; S. v. Walker, 167 Mo. 366, 67 S. W. 228; Com. v. Miller (Ky. 1909), 115 S. W. 234.

29. Vol. II, § 585; ante, § 224; Rex v. Stocker, 1 Salk. 342, 371.

30. Vol. II, § 586; Rasnick v. C., 2 Va. Cas. 356.

31. Vol. I, § 332 (3).

32. Ante, § 413 (1).

33. Ante, §§ 213-216.

than one in a single count, whether connected by "and" or "or."[34] For example.—

2. **"Bond," "Writing Obligatory."**—Where, under 2 Geo. 2, c. 25, the instrument forged was laid as a "bond *and* writing obligatory," two terms which the statute used disjunctively, the allegation was deemed well enough; because, a bond being a writing obligatory, this instrument was both.[35] Yet there could be no advantage to the pleader in such superfluous form. And—

3. **"Warrant," "Order."**—If the statutory words are "warrant *or* order," the indictment may say "warrant *and* order;" but the writing set out and produced in evidence must be both.[36] Where it is not both, the count will be ill,[37] or will not be sustained in proof.[38] Should the pleader deem both words desirable in allegation, a ready method, obviating all objections, is to make two counts.[39] The statutory "or" will not do. Yet another method is suggested in the first volume.[40]

§ 440. "Forged," "Counterfeit."—In a statute against uttering, if the words are "any forged, counterfeited, *or* falsely altered instrument or writing," the indictment may

34. Vol. II, §§ 585-592.

35. Dunnett's Case, 2 East P. C. 985, 2 Leach, 581.

36. Vol. II, § 588 (2); S. v. Jones, 1 McMul. 236, 36 Am. D. 257; S. v. Holley, 1 Brev. 35; Rex v. Crowther, 5 Car. & P. 316.

37. Reg. v. Dixon, 3 Cox C. C. 289.

38. Reg. v. Williams, 2 Car. & K. 51.

39. Reg. v. Autey, Dears. & B. 294, 7 Cox C. C. 329. Contrary to the text, is an English case wherein the indictment termed the forged instrument a warrant, order, and request for the delivery of goods, and recited it in haec verba; the judges held that though it was only a request, the allegation was still good, the other names being rejected as surplusage. "The question," said Parke, B. "may be very difficult (different) if the indictment sets out the instrument, from what it would be if it merely described it in the terms of the statute. In the former case, the matter which, it is contended, is descriptive, may be mere surplusage; for when the instrument is set out on the record, the courts are enabled to determine its character, and so a description is needless." Reg. v. Williams, 2 Den. C. C. 61, 63, 4 Cox C. C. 356, 2 Eng. L. & Eq. 533.

40. Vol. II, § 588 (3).

describe the writing as "forged *and* counterfeited."[41] These two terms are in meaning so nearly alike[42] that no harm could ordinarily or ever come from joining them, yet it would be difficult to suggest a case wherein either would not be as good as both. Under an Alabama statute "or" is permissible in such a place.[43]

§ 441. 1. **Expanding the Averments beyond the Statute,**—explained in the first volume,[44] is sometimes required. Thus,—

2. **A Fraudulent Intent,**—as at common law, must be charged though the statute is silent thereon.[45] But—

3. **For Forging a Deed of Land,**—the indictment need not set out the apparent grantor's interest in the land.[46]

§ 442. 1. **Election—(Forging—Uttering).**—Where, in fact, the defendant first forged an instrument, then uttered it, he may be indicted for either; or, in some forms of the statutes, for both; and always the two may be joined in separate counts, and sometimes in one, as before explained.[47]

2. **Altered.**—Since altering an instrument may be charged as forging it,[48] an allegation that the defendant forged an order for a specified sum is sustained by proof of a genuine order for a smaller sum altered by him to the larger.[49]

§ 443. 1. **The Statutory Terms**—must be sufficiently followed, as explained in the first volume.[50] Thus,—

41. Hobbs v. S., 9 Mo. 855.

42. Ante, § 426 (1), note.

43. Johnson v. S., 35 Ala. 370. See Vol. II, § 587.

44. Vol. II, §§ 623-630; Harrington v. S., 54 Miss. 490; U. S. v. Schoyer, 2 Blatch. 59. And see U. S. v. Barney, 5 Blatch. 294.

45. Harrington v. S., supra; Reg. v. Powner, 12 Cox C. C. 235, 4 Eng. Rep. 525. And see Rex v. Rushworth, Russ. & Ry. 317.

46. West v. S., 2 Zab. 212.

47. Ante, 437 (3); Hoskins v. S., 11 Ga. 92. And see Rex v. Reeves, 2 Leach, 808, 814.

48. Ante, § 419 (2).

49. S. v. Flye, 26 Me. 312.

50. Vol. II, §§ 608-622; Rex v. Hall, 2 East P. C. 895; Powell v. C., 11 Grat. 822; S. v. Watson, 65 Mo. 115; Rex v. Donnelly, 1 Moody, 438.

2. **On a Statute in Two Sections,**—the pleader should consider within which one is the offense, and adjust his count to its special phraseology.[51] And, in short,—

§ 444. **The Statutes differ**—in their terms, and what in form seems permanent to-day is changed to-morrow; hence the indictments should differ, being always drawn with careful reference to the particular present statute.[52]

§ 445. Secondly. *In Forging and Uttering Forged Bank-bills*:—

The Indictment for Forging,—subject to be varied by the terms of the statute, may charge that on, etc., at, etc., the defendant falsely [feloniously, if a felony] did forge and counterfeit [or did forge] a bank-note [purporting to be a note of the bank of, etc., an allegation probably unnecessary] of the tenor following [here set out the forged paper *verbatim*], with intent to defraud one B [*or* with intent to defraud said bank, perhaps adding, said bank being then and there a corporation, etc.] [53]

§ 446. **For Altering,**—the indictment, subject to be varied as above explained, may aver that the defendant, on, etc., at, etc., having in his possession a bank-note of the tenor following [here set it out *verbatim*], did then and there feloniously alter the said bank-note by [here set out the alteration, adding, if the pleader chooses, but this is believed not to be necessary, so that said bank-note, so altered, did then and there become of the tenor following, setting it out *verbatim* in the altered form], with intent to defraud [as in the last section]. [54] Generally the practitioner will find it more convenient and best to draw the indictment simply for forging, as in the last section; setting

51. S. v. Hayden, 15 N. H. 355; Com. v. Miller (Ky. 1909), 115 S. W. 234; P. v. McPherson, 6 Cal. Ap. 266, 91 P. 1098.

52. And see Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 356.

53. See, for forms, Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 369, 19th Ed. 625; 3 Chit. Crim. Law, 1048; S. v. McLeran, 1 Aikens, 311. Compare with Dir. & F. § 465.

54. For forms, see 3 Chit. Crim. Law, 1051; S. v. McLeran, 1 Aikens, 311. Insufficient, Mount v. C., 1 Duv. 90.

out the note in its altered form, and saying nothing of it as before the alteration.[55]

§ 447. **For Uttering,**—that the defendant on, etc., at, etc., feloniously did offer, utter, dispose of, and put off [or whatever the statutory words may be] a false and forged bank-note [of such a bank, etc., unnecessary] [56] of the tenor following [here set out the note *verbatim*], with intent to defraud [as in section before the last]; he the said [defendant] then and there, while so feloniously offering, uttering, disposing of, and putting off the same, well knowing the same to be false and forged.[57]

§ 448. **No Purport Clause,**—terming the forged writing a bank-bill, is, we have seen,[58] necessary.[59] Or,—

§ 449. **"Promissory Note"**—may ordinarily be given as the name of the instrument; because, in law, a bank-bill is such.[60] So—

§ 450. **"Bank-bill and "Bank-note"**—are synonymous, and they may be used interchangeably.[61] Or both may be employed, connected by "and."[62]

§ 451. **"Knowingly,"** etc.—The *scienter* must be averred and proved. Certainly it must be where the indictment is on a statute having the word "knowingly" or its equivalent,[63] and the same seems to be required under all circumstances.[64] The

55. Ante, § 419.

56. Ante, §§ 413-416; post, §§ 448, 454.

57. And see forms 3 Chit. Crim. Law, 1052; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 369, 19th Ed. 609, 625; Wilkinson v. S., 10 Ind. 372; Buckland v. C., 8 Leigh, 732; C. v. Carey, 2 Pick. 47. Compare with Dir. & F. § 466; S. v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

58. Ante, §§ 413, 414; S. v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

59. U. S. v. Williams, 4 Bis. 302.

60. Stat. Crimes, § 336; C. v. Simonds, 14 Gray, 59; S. v. Wilkins, 17 Vt. 151; C. v. Carey, 2 Pick. 47; C. v. Hensley, 2 Va. Cas. 149.

61. Stat. Crimes, § 337; S v. Wilkins, 17 Vt. 151.

62. Stone v. S., Spencer, 404, 406.

63. Henderson v. S., 14 Tex. 503.

64. Ante, §§ 400 (2), 425 (1); S. v. Morton, 8 Wis. 352. As to the form, see Buckland v. C., 8 Leigh, 732. Where the statutory words "knowing the same to be forged and counterfeited" were omitted

defendant may rebut the government's *prima facie* case.[65]

§ 452. **The Name of the Person**—to whom the counterfeit was uttered is not given in the common forms of the indictment for uttering, yet that of the one to be defrauded is.[66] This appears to be in general sufficient; but if the latter were omitted, the former would be required.[67] And perhaps there are circumstances or statutes under which it will be at all events.[68]

§ 453. **"Utter," "Dispose of," etc.**—Under the statutory words "utter and publish," it was adjudged ill to say in the indictment "dispose of and put away." The former phrase was deemed "more general and comprehensive" than the latter.[69]

§ 454. 1. **The Existence and Incorporation of the Bank,**—whether to allege and prove them, and how, will depend in part on considerations stated in the first volume, to which the reader is referred;[70] also, in part on the terms of the statute, in connection with principles of the unwritten law. Thus,—

2. **The Statutory Words**—being, any note of "any bank or banking company which is or shall be established within

from the indictment, the defect was held not to be supplied by the allegation that the counterfeit bill was uttered and given in payment with an "intent to defraud." S. v. Nicholson, 14 La. Ann. 785. But at common law it has been adjudged sufficient to allege that on, etc., at etc., the defendant "did feloniously pass a certain counterfeited bank-note, the tenor of which bank-note is as follows (giving a copy of it), with intent to defraud" B, the person to whom it was passed. Swain v. P., 4 Scam. 178.

65. S. v. Morton, supra.

66. Ante, § 447.

67. Ante, § 259 (2). And see Buckland v. C., 8 Leigh, 732.

68. Buckley v. S., 2 Greene (Iowa), 162; Wilkinson v. S., 10 Ind. 372.

69. S. v. Petty, Harper, 59. Indictment for uttering need not allege how, by whom or with what intent the forgery was made. Elaridge v. Com., 21 Ky. L. 1087, 54 S. W. 10; S. v. Goodrich, 67 Minn. 176, 69 N. W. 815; as to "utter and publish" in indictment. S. v. Samuels, 144 Mo. 68, 45 S. W. 1088; "selling and delivering," with intent to have forged instrument uttered and passed is sufficient under statute prohibiting "passing, uttering or publishing." S. v. Mills, 146 Mo. 195, 47 S. W. 938; as to possession of forged writing. S. v. Turner, 148 Mo. 206, 49 S. W. 988.

70. Vol. II, § 682.

this State or in any other part of the United States," an indictment was held good which simply introduced the forged writing as "a certain false, forged, and counterfeit promissory note for the payment of money," then set it out *verbatim,* and charged the intent to be to defraud an individual named. It was an ordinary bank-note, wherein the name of the bank appeared. And probably if, in spite of the special terms of the statute, there had been no such bank, the offense would still have been forgery.[71] The court, replying to the objection that the corporate existence was not averred, said, by Parker, C. J., "that was not necessary, as the indictment states a design to defraud an individual."[72] But would it have been otherwise if the intent laid had been to defraud the bank?

§ 455. 1. **A Corporation,**—in respect of the present inquiry, differs from an individual only in that its creator is the law, and its capacity extends over but a part of the circle man.[73] And it is as well known judicially to our tribunals that corporate banks exist as that men do. In some of the States, the statutes creating them are, even to their special terms, parts of their public laws, whereof the courts take recognizance without proof; and where this is not so, the result of the argument is the same; namely,—

2. **In Reason,**—since individuals and banks are equally known to exist, and they differ simply in extent of capacity, the existence of the one may be alleged similarly to that of the other, and be proved by like evidence. And—

3. **In Authority,**—though judicial opinions on the question are a little obscure, and some appear opposed to this view, it is, on the whole, reasonably well sustained by them. Of the existence of banks whereof the courts take judicial cognizance, not even proof is necessary.[74]

71. New Crim. Law, II, § 543.

72. C. v. Carey, 2 Pick. 47, 50. This indictment had the words "purport and effect," where "tenor" should have been employed to indicate the exact recital of the instrument; but the attenion of the court was not called to this error, and it was corrected by subsequent decisions. C. v. Wright, 1 Cush. 46; C. v. Tarbox, 1 Cush. 66.

73. New Crim. Law, I, § 417.

74. See, and compare, U. S. v. Williams, 4 Bis. 302; S. v. Hayden,

§ 456. **Where Proof of the Corporate Existence**—of the bank is required,[75] whether domestic or of another State, it may be by an exemplification of the act of incorporation, with evidence of organization thereunder. And in some of the States this method is specially pointed to by statute.[7]] But both on principle and by the better authorities, other methods, usually more convenient, are equally permissible; as, if the statute neither directly nor by implication provides otherwise,[77] its mere *de facto* existence, the performance of the functions of a bank, to be shown by parol, or even, according to some of the cases, reputation, will suffice.[78] And in this way the fact that persons whose names are borne on its bills as officers are such may be made to appear.[79] An admission of the bank's existence is also

15 N. H. 355; C. v. Smith, 6 S. & R. 568; Trice v. S., 2 Head, 591; Williams v. S., 9 Humph. 80; Jennings v. P., 8 Mich. 81; S. v. Carr, 5 N. H. 367; Fergus v. S., 6 Yerg. 345; P. v Ah Sam, 41 Cal. 645; P. v. Stearns, 21 Wend. 409; P. v. Caryl, 12 Wend. 547; S. v. Cole, 19 Wis. 129, 88 Am. D. 678; Manaway v. S., 44 Ala. 375; S. v. Brown, 4 R. I. 528, 70 Am. D. 168; S. v. Pierce, 8 Iowa, 231; S. v. Morton, 8 Wis. 352; Johnson v. S., 35 Ala. 370; Murry v. C., 5 Leigh, 720; Hobbs v. S., 9 Mo. 855; Cady v. C., 10 Grat. 776. In a North Carolina case, a South Carolina bank-bill was described as "a false, forged, and counterfeited promissory note, commonly called a bank-note, purporting to be a good and genuine bank-note of one hundred dollars on the Bank of the State of South Carolina." And this was held to be a sufficient averment of the existence of the bank. S. v. Ward, 2 Hawks, 443.

75. Ante, § 455; S. v. Pierce, 8 Iowa, 231; Jones v. S., 11 Ind. 357; S. v. Hayden, 15 N. H. 355; C. v. Smith, 6 S. & R. 568. While the existence of a domestic bank may be matter of judicial knowledge, that of a foreign is not, and it must be proved. Owen v. S., 5 Sneed, 493, 495.

76. Jones v. S., 5 Sneed, 346, 348; Stone v. S., Spencer, 401; P. v. Stearns, 21 Wend. 409, 23 Wend. 634; Stone v. S., 20 N. J. L. 401; Sasser v. S., 13 Ohio 453.

77. Post, § 457; Trice v. S., 2 Head, 591; Jones v. S., 5 Sneed, 346, 348.

78. P. v. Caryl, 12 Wend. 547; S. v. Cole, 19 Wis. 129, 88 Am. D. 678; P. v. Ah Sam, 41 Cal. 645; P. v. Chadwick, 2 Par. Cr. 163; Dennis v. P., 1 Par. Cr. 469; S. v. Calvin, R. M. Charl. 151; Reed v. S., 15 Ohio, 217, 224; Jennings v. P., 8 Mich. 81; Cady v. C., 10 Grat. 776; Clark v. S., 14 Ind. 26; P. v. Chandler, 4 Par. Cr. 231; P. v. D'Argencour, 18 N. Y. Wkly. Dig. 532.

79. S. v. Smith, 5 Day, 175, 5 Am. D. 132.

implied in the passing of its note as good, and no other proof is necessary.[80] Still,—

§ 457. **The Special Terms of the Statute**—may change all this. Where they were, "a bank-bill, or note, or check, or draft upon a bank, or the certificate of deposit of money therein, *of any bank or company incorporated by law, in any part of the United States,*" these italic words were required to be covered by the allegation.[81] It was not enough to say, for example, "one forged and counterfeit bank-bill, of the denomination of three dollars, on the Merchants' Bank of Massachusetts." That the bank was by law incorporated must be averred;[82] it was not an adequate substitute to say it was established in the State.[83] Under a different form of legislation, an averment of the incorporation of the bank was adjudged unnecessary.[84] Again,—

§ 458. **A Needless Allegation of Incorporation,**—when descriptive in form, requires proof, on a principle explained in the first volume.[85] Thus, if the forged bill is laid as purporting[86] to be from a bank duly authorized by the State to issue it, the incorporation and authority are made descriptive, and they must be proved, even assuming no mention of them to be necessary.[87]

§ 459. **Explanatory Allegations,**—to show apparent legal efficacy, may be required.[88] Thus, one was charged in Tennessee with passing a counterfeit note as follows: "This note of seventy-five cents is payable to the bearer at the treasury of North Carolina, agreeably to the act of Assembly of 1823, c. 7. Raleigh, 20th July, 1824. J. H., Public Treasurer." There was here no promise to pay, and the

80. McCartney v. S., 3 Ind. 353, 56 Am. D. 510; S. v. Brown, 4 R. I. 528, 70 Am. D. 168. See Reg. v. Portis, 40 U. C. Q. B. 214.

81. Kennedy v. C., 2 Met. Ky. 36; C. v. Simonds, 11 Gray, 306. See C. v. Boynton, 2 Mass. 77.

82. Kennedy v. C., supra.

83. C. v. Simonds, supra.

84. S. v. Van Hart, 2 Harrison, 327. And see S. v. Carr, 5 N. H. 367.

85. Vol. II, §§ 482, 483, 485-487.

86. Ante, § 416.

87. S. v. Newland, 7 Iowa, 242, 71 Am. D. 444.

88. Ante, §§ 402, 415, 418a.

existence of the North Carolina statute, which created the obligation, was not judicially known in Tennessee. Therefore it should have been averred; so the indictment was ill.[89] If, in any case, the forged instrument does not on its face appear valuable, or its forgery adapted to work a fraud, extrinsic facts must be set out to show the court its fraudulent tendency in law.[90]

§ 459 a. **The Proof that the Bank-bill is a Forgery**—is within previous explanations.[91] One who has sufficiently practised the handling and judging of bills of the sort to have an enlightened opinion may, as a witness, state to the jury what it is. But the weight of the opinion will vary with his capacity and means for judging.[92] He need not know the signatures of the officers, if, for example, he is competent to pass on the character of the engraving, or to decide from the general appearance of the bill.[93] Or it suffices if he knows the signatures merely from having seen them on bills in circulation.[94] But a judgment founded merely on a comparison with bank reporters and directories will not be received.[95]

§ 460. 1. **Other Points**—have been adjudged, yet mainly within prior explanations in this chapter.[96] Thus,—

89. Tait v. S., 3 Yerg. 449, 450.

90. Reed v. S., 28 Ind. 396.

91. Ante, §§ 429-432c, 435, 436.

92. Jones v. Finch, 37 Miss. 461, 75 Am. D. 73; Clark v. S., 14 Ind. 26; S. v. Chandler, 3 Hawks, 393; Johnson v. S., 2 Ind. 652; Pate v. P., 3 Gilman, 644; P. v. Chandler, 4 Par. Cr. 231; Watson v. Cresap, 1 B. Monr. 195, 36 Am. D. 572; S. v. Cheek, 13 Ire. 114; Jones v. S., 11 Ind. 357; U. S. v. Keen, 1 McLean, 429; S. v. Harris, 5 Ire. 287.

93. Jones v. Finch, supra; Allen v. S., 3 Humph. 367; Johnson v. S., 2 Ind. 652; Johnson v. S., 35 Ala. 370; S. v. Harris, 5 Ire. 287; P. v. Caryl, 12 Wend. 547; S. v. Ravelin, 1 D. Chip. 295. And see S. v. Candler, 3 Hawks, 393; S. v. Allen, 1 Hawks, 6, 9 Am. D. 616.

94. S. v. Carr, 5 N. H. 367; Allen v. S., supra; May v. S., 14 Ohio, 461, 45 Am. D. 548

95 S. v. Brown, 4 R. I. 528, 70 Am. D. 168.

96. S. v. Twitty, 2 Hawks, 449; S. v. Wheeler, 35 Vt. 261; S. v. Wilkins, 17 Vt. 151. For example, **Person to be defrauded.**—Under the Iowa staute, the intent to defraud a particular person need not be set out. S. v. Barrett, 8 Iowa, 536. The existence of the corporation to be defrauded may be proved though not averred. S. v. Shaw, 92 N. C. 768. An alleged intent to defraud a firm is sustained by proof of the

2. **Circulate as Money.**—That the forged bill was issued to circulate as money need not be alleged.[97]

3. That it was believed to be genuine—by the person receiving it, is useless in allegation.[98]

4. **For an Uttering,**—contrary to 15 Geo. 2, c. 28, by the trick called "ringing the changes," no averment was required that it was in payment as and for good and lawful money; for the statutory words were in the disjunctive, "utter or tender in payment."[99]

5. **A Question of Variance,**—between allegation and proof, is to be submitted under instructions from the court to the jury;[1] unless the variance is palpable, in which case it is not.[2] An allegation that a bank-note is payable to "A, bearer," is supported by proof of a note payable to "A *or* bearer."[3]

§ 461. Thirdly. *For possessing Forged Bank-notes with Intent to pass them:—*

Not being a Sufficient Criminal Act,[4]—this is not indict-

same to defraud one partner. Stoughton v. S., 2 Ohio St. 562. And see S. v. Cross, 101 N. C. 770, 9 Am. St. 53.

The tenor—is not required in Alabama. Bostick v. S., 34 Ala. 266. How irregularity as to, cured. C. v. Ervin, 2 Va. Cas. 337.

Non-existing bank.—An indictment to be good under the Tennessee act of 1829, against fraudulently passing any note purporting to be a bank-note, when no such bank exists, must aver, 1. That there was no such bank; 2. That the defendant, at the time of passing the pretended bank-note, knew there was none; and 3. That it was with intent to defraud the person to whom passed. William v. S., 9 Humph. 80.

Fraudulent intent.—The manner in which the defendant read an ambiguous note to the person to whom he was endeavoring to pass it may be shown in evidence of the fraudulent intent. Butler v. S., 22 Ala. 43.

97. Bostick v. S., supra; Mathena v. S., 20 Ark. 70.

98. Wilkinson v. S., 10 Ind. 372.

99. Rex v. Franks, 2 Leach, 644.

1. S. v. Potts, 4 Halst. 26, 17 Am. D. 449; Hess v. S., 5 Ohio, 5, 22 Am. D. 767.

2. Turpin v. S., 19 Ohio St. 540, referring to the above cases and May v. S., 14 Ohio, 461, 466, 45 Am. D. 548.

3. Quigley v. P., 2 Scam. 301. Other similar instances are Rooker v. S., 65 Ind. 86; Haslip v. S., 10 Neb. 590, 7 N. W. 331.

4. New Crim. Law, I, § 204; ante, § 265 (1).

able at common law. So the procedure is always on a statute.

§ 462. **Tenor.**—Contrary to the rule where the counterfeited thing is a coin,[5] the counterfeit bank-bills must be set out by their tenor,[6] already described.[7] And if they cannot because in the defendant's possession, this fact should be laid in excuse. And notice to produce them at the trial is not necessary as foundation for the introduction of parol evidence of their contents.[8]

§ 463. 1. **The Indictment,**—in which as just said the tenor must be given, corresponds otherwise to that for possessing counterfeit coin with the intent to pass it, already described.[9] Being statutory, it must conform alike to general principles and to the terms of the statute.[10]

2. **Person to be Defrauded.**—If, in charging possession of counterfeit coin with intent to pass it, the person to be defrauded need not be mentioned,[11] the same would seem, in reason, to be the rule in this offense. But some of the forms have this averment,—as, with intent to defraud the bank,[12]—and there may be statutes under the words whereof it is necessary in principle.[13]

§ 464. 1. **The True Interpretation of the Statute**—should be considered by the pleader, who will follow the interpreted terms, not the literal.[14] Thus,—

2. "**As True.**"—The words of a statute being "with intent to utter or pass the same, or to render the same cur-

5. Ante, §§ 250, 265 (2).

6. S. v. Callendine, 8 Iowa, 288. See McMillen v. S., 5 Ohio, 268.

7. Ante, §§ 403-405.

8 Ante, § 433; McGinnis v. S., 24 Ind. 500, overruling Armitage v. S., 13 Ind. 441, and Williams v. S., 16 Ind. 461. See P. v. Stewart, 4 Mich. 655.

9. Ante, § 265 (2).

10. And see, as to the form, 3 Chit. Crim. Law, 1050; P. v. Peabody, 25 Wend. 472; Brown v. C., 8 Mass. 59; Townsend v. P., 3 Scam. 326; S. v. Callendine, 8 Iowa, 288; P. v. Stewart, 4 Mich. 655; Jones v. S., 11 Ind. 357; Fergus v. S., 6 Yerg. 345.

11. Ante, § 265 (2).

12. See the cases above cited.

13. In matter of fact, not all the forms have this allegation. It appears, for example, not to have been in C. v. Davis, 11 Gray, 4, or C. v. Price, 10 Gray, 472, 71 Am. D. 668.

14. Dir. & F., § 32.

rent as true," an indictment on the former clause, laying the intent to be simply "to utter and pass the same," was adjudged inadequate; because, by interpretation, the qualifying "as true" extended to the two clauses alike, and it should have been in this indictment.[15] But it was otherwise under a statute differently framed, where "as true," though inserted, did not qualify the particular clause.[16] Again,—

§ 465. **Beyond Statutory Words.**—Where the keeping of bank-bills "fraudulently" was the offense under a statute silent as to any intent beyond, the defendant's knowledge of their being counterfeit, and his intent to pass them, were held by construction to be an element of the offense. Hence they must be alleged.[17] "This," said Caruthers, J., "is necessary to make the possession *fraudulent.*"[18]

§ 466. 1. **Where pass.**—It need not be laid that the intent was to pass the spurious notes in the State of the court or even in the county.[19]

2. **"Circulate as Currency."**—If the statutory offense is the fraudulent possession of forged bank-notes which circulate as currency, it need not be alleged that the genuine ones do thus circulate.[20]

§ 467. **Numbers.**—Under the words "shall possess at any one time any number [of bank-bills] not less than ten," the indictment was required to charge the defendant with

15. P. v. Stewart, 4 Mich. 655, 657.

16. Ib.; Hopkins v. C., 3 Met. 460. And see C. v. Price, 10 Gray, 472, 71 Am. D. 668; C. v. Davis, 11 Gray, 4.

17. Vol. II, §§ 623-630.

18. Owen v. S., 5 Sneed, 493, 495. And see, as illustrative, ante, § 172.

"Feloniously." Under this statute, the intent need not be alleged to be "felonious." Perdue v. S., 2 Humph. 494; Vol. II, §§ 533-536.

Subsequent banks. These statutes extend to banks established since their enactment. C. v. Swinney, 1 Va. Cas. 150, 151.

19. Clark v. C., 16 B. Monr. 206; Spence v. S., 8 Blackf. 281; C. v. Cone, 2 Mass. 132. See also C. v. Judd, 2 Mass. 329, 3 Am. D. 54; C. v. Price, 10 Gray, 472, 71 Am. D. 668; C. v. Davis, 11 Gray, 4.

20. S. v. Shelton, 7 Humph. 31.

having them at the "same time." Saying the possession was "on the same day" is not sufficient.[21]

§ 468. **Proof of Intent.**[22]—It was in one case observed that the evil intent, which is the gist of this offense, "must, at least in part, be evidenced by some act of the party." [23] But while this expression of opinion may be useful in caution to the jury, they are the sole judges of the intent,[24] and the law does not limit them to one sort of relevant testimony.

§ 469. **Existence of Bank.**—Such questions as whether and how to aver and prove the existence of the bank are the same which have been already considered.[25] It is deemed, for example, that if the bank is foreign, general evidence of its existence will suffice;[26] as, that its bills circulate as good. Its charter need not be proved.[27]

§ 470. Fourthly. *As to Promissory Notes and Bills of Exchange:*—

1. **The Form of the Indictment**—appears in a general way from the foregoing elucidations.[28] As to some special questions,—

2. **Foreign.**—In England an indictment for uttering a forged foreign promissory note need not say it is payable in England.[29] Such plainly is the rule with us.

§ 471. **An Acceptance**—of a bill is distinguished from the bill itself. A charge of uttering a forged bill

21. Edwards v. C., 19 Pick. 124. And see C. v. Houghton, 8 Mass. 107; S. v. Booney, 34 Me. 223; C. v. Thomas, 10 Gray, 483.

22. Vol. II, § 1101; ante, § 420 et seq.

23. S. v. Penny, 1 Car. (Law Repos.) 517.

24. Perdue v. S., 2 Humph. 494.

25. Ante, § 454 et seq.

26. P. v. Davis, 21 Wend. 309; P. v. Peabody, 25 Wend. 472.

27. Sasser v. S., 13 Ohio, 453. But compare, Com. v. Miller (Ky. 1909), 115 S. W. 234.

28. See, for forms, Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 372, 373 (19th Ed.) 627; 3 Chit. Crim. Law, 1071-1074; Dir. & F., §§ 464, 468, 469; Bevington v. S., 2 Ohio St. 160; Labbaite v. S., 6 Tex. Ap. 257; S. v. Pullens, 81 Mo. 387. And see Rex v. Reading, 1 East, 180, note.

29. Reg. v. Lee, 2 Moody & R. 281.

is not sustained by that of a forged acceptance.[30]

§ 472. 1. **Indorsement.**[31]—On a bill payable to the order of four persons, executors, a charge of the forgery of the name of one of them as indorser adequately sets out an offense.[32] If the crime consists of forging the body of a note, indorsements, appearing upon it, may be disregarded.[33] Where the allegation is of uttering a promissory note with more than one name falsely indorsed on it, proof of one will suffice.[34]

2. **Other Instances**—may be shown in aid of the proofs of knowledge and criminal intent, within rules already explained.[35]

3. **Variance**—has been already considered.[36]

4. **Other Questions of Evidence**—have been adjudged, but involving no principles special to this branch of the offense.[37]

§ 473. Fifthly. *As to "Undertakings," "Warrants," "Orders," etc.:*[38]—

30. Rex v. Horwell, 1 Moody, 405, 6 Car. & P. 148.

31. Dir. & F., §§ 472, 473; U. S. v. Morris, 16 Blatch, 133; Langford v. S., 33 Fla. 233.

32. Reg. v. Winterbottom, 1 Den. C. C. 41, 2 Car. & K. 37.

33. Perkins v. C., 7 Grat. 651. Compare, P. v. Thornburgh, 4 Cal. Ap. 38, 87 P. 234.

34. P. v. Rathbun, 21 Wend. 509. As to laying the intent to defraud, see S. v. Crawford, 2 Ind. 23. See, further, as to a forged indorsement. C. v. Welch, 148 Mass. 296, 19 N. E. 357.

35. Ante, § 428; Reg. v. Brown, 2 Fost. & F. 559, doubting Reg. v. Cooke, 8 Car. & P. 586.

36. Ante, §§ 406-408, 416, 434, 460 (5). And see Perkins v. C., 7 Grat. 651, 56 Am. D. 123; P. v. Badgley, 16 Wend. 53; May v. S., 14 Ohio, 461, 45 Am. D. 548; Reg. v. Hawkes, 2 Moody. 60; S. v. Blanchard, 74 Iowa, 628; U. S. v. Marcus, 53 Fed. Rep. 784; P. v. Phillips, 70 Cal. 61, 11 P. 493; Garmire v. S., 104 Ind. 444, 4 N. E. 54; S. v. Jackson, 90 Mo. 156, 2 S. W. 128; Alexander v. S., 28 Tex. Ap. 186; S. v. Lane, 80 N. C. 407.

37. Reg. v. Portis, 40 U. C. Q. B. 214; Rex v. Crocker, Russ. & Ry. 97, 2 New Rep. 87, 2 Leach, 987; P. v. Blakeley, 4 Par. Cr. 176, 184, 185; Rex v. Downes, 2 East P. C. 997; Reg. v. Beard, 8 Car. & P. 143; Koons v. S., 36 Ohio St. 195; S. v. Hopkins, 50 Vt. 316; Luttrell v. S., 85 Tenn. 232, 4 Am. St. 760, 1 S. W. 886.

38. See Stat. Crimes, §§ 325-343.

The Indictment—for the forgery, for example, of a "warrant for the payment of money," on a statute making it felony, may charge that on, etc., at, etc., the defendant feloniously did forge a certain warrant[39] for the payment of money, of the tenor, etc., with intent to defraud X.[40]

§ 474. 1. **Variance.**—An allegation of an order on a bank corporation is satisfied in evidence by an order on the cashier.[41]

2. **Proof of Request.**—That one has received goods does not prove an utterance by him of a forged request for their delivery, where no collateral or connecting evidence appears.[42]

IV. *Questions of Practice.*

§ 475. **The County for the Indictment:**—

1. **In the First Volume**—is an explanation of the county wherein an offense is to be laid as committed.[43] As to—

2. **Forged Paper by Mail.**—A letter sent by mail from one county to another containing a forged instrument is an uttering of it in the latter county;[44] the mail being the utterer's innocent agent.[45] On the other side, if, as the court interprets the statute, the offense is complete only

39. Ante, § 439 (3).

40. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 374; 3 Chit. Crim. Law, 1054, 1074 et seq.; Dir. & F., § 470.

Receipt." As to a receipt, including the evidence, see S. v. Dalton, 2 Murph. 379; Rex v. Thomas, 2 East P. C. 934; Reg. v. Milton, 10 Cox C. C. 364; Henry v. S., 35 Ohio St. 128; S. v. Henderson, 29 W. Va. 147, 1 S. E. 225; S. v. Riebe, 27 Minn. 315; Dir. & F., § 471.

Order, etc. Goodson v. S., 29 Fla. 511, 30 Am. St. 135, 10 So. 738; Carver v. P., 39 Mich. 786; P. v. Kemp, 76 Mich. 410, 43 N. W. 439.

41. U. S. v. Hinman, Bald. 292. And see further as to variance, Abbott v. S., 59 Ind. 70; Rex v. Thomas, 2 East P. C. 934.

42. Reg. v. Johnson, 6 Cox C. C. 18.

43. Vol. I, § 45 et seq. Particularly, in forgery, see U. S. v. Britton, 2 Mason, 464; Bland v. P., 3 Scam, 364; P. v. Rathbun, 21 Wend. 509; Perkin's Case, 2 Lewin, 150; McGuire v. S., 37 Ala. 161; Rex v. Pim, Russ. & Ry. 425; Jessup v. S., 44 Tex. Cr. 83, 68 S. W. 988; S. v. Hudson, 13 Mont. 112, 32 P. 413, 19 L. R. A. 775; Luttrell v. S., 85 Tenn. 232, 1 S. W. 886.

44. Vol. I, § 53 (4).

45. Bishop v. S., 30 Ala. 34. And see Rex v. Pim, Russ. & Ry. 425.

when the forged paper has reached the person to whom it is addressed, no indictment will lie in the county of the sending.[46] But by the opinions of some judges, under some statutes, the deposit of the letter is an uttering, and then the offender is liable equally in the county where he makes such deposit.[47]

§ 476. **As to the Place of the Forgery, the Presumption**—from an uttering in a particular State or county will not alone sustain the charge that the instrument was forged there. So it was held on this naked fact where the date of the forged paper was in another State.[48] And—

§ 477. **The mere Fact of Possession,**—or uttering, or both, in a county, even under circumstances of some suspicion, has been deemed, not without dissent, to be inadequate proof that the forgery was there committed.[49] On the other hand, this has been regarded as evidence tending to such conclusion;[50] even as strong evidence.[51] Still,—

§ 478. **The Question is for the Jury,**—who yet should find the defendant guilty only on evidence legally sufficient.[52] And—

§ 479. **By some American Opinions,**—not much, if anything, need be added to possession or uttering in the county of the indictment, to justify the finding that the forgery was there also. This, "together with the entire want of evidence of a prior possession elsewhere, was," it was said in one case, "sufficient in the absence of countervailing testimony."[53] An exception is made of "such papers as pass from hand to hand in the common transactions of life." As to the other class, "the uttering," said Ruffin, C. J., "if unexplained, is in sound sense evidence of the

46. P. v. Rathbun, 21 Wend. 509.

47. Vol. I, § 61 (1); Perkins's Case, 2 Lewis, 150.

48. C. v. Parmenter, 5 Pick. 279.

49. Rex v. Parkes, 2 East P. C. 992; Rex v. Crocker, 2 Leach, 987, 2 New Rep. 87, Russ. & Ry. 97.

50. S. v. Poindexter, 23 W. Va. 805; Spencer v. Com., 2 Leigh (Va.), 751.

51. S. v. Yerger, 86 Mo. 33.

52. Rex v. Crocker, 2 Leach, 987, 2 New Rep. 87, Russ. & Ry. 97; Rex v. Parkes, 2 East P. C. 992.

53. Johnson v. S., 35 Ala. 370, 379.

forgery of the paper by the utterer; and if the paper, as in this case, was in his hands in an incomplete state, and was produced by him in a completed state, and made in his own favor and produced for his benefit, the proof is cogent and plenary that his was the hand that fabricated it, or, at least, that he was present and wittingly assented."[54]

§ 480. **The Doctrine,**—at least of our American courts, we may in conclusion deem, from these and other cases, to be that very slight evidence, and by some opinions none, added to the unexplained fact of a possession or uttering in the county of the indictment, will justify the jury in finding such to have been the place of the forgery.[55] Yet in reason, each complication of facts, and the law relating thereto, should be specially considered. If, for example, the uttering is punished less heavily than the forging, a court could not permit its jury to convict one of the latter on mere evidence of the former. But if the defendant relied on his forgery in the county of the indictment, this might ordinarily be accepted as, in law, a ratification there [56] of the original forging, wherever committed. These are examples of what may be taken into view in connection with differing facts.

§ 481. *Other Questions*:—

1. **Forging and Uttering**—are, where both are punishable, ordinarily, not under all statutes, distinct offenses; and on an indictment for the one there cannot be a conviction of the other.[57] But—

2. **In Alabama,**—for example, it is by statute provided

54. S. v. Morgan, 2 Dev. & Bat. 348, 352.

55. Spencer v. C., 2 Leigh, 751. And see U. S. v. Britton, 2 Mason, 464; Bland v. P., 3 Scam. 364; S. v. Jones, 1 McMul. 236, 36 Am. D. 257; Henderson v. S., 14 Tex. 503.

56. Ante, § 236.

57. Dir. & F., §§ 462, 476; ante, § 437 (3); Luttrell v. S., 85 Tenn. 232, 4 Am. St. 760, 1 S. W. 886; P. v. Van Alstine, 57 Mich. 69, 23 N. W. 594; P. v. McMillan, 52 Mich. 627; Hooper v. S., 30 Tex. Ap. 412, 28 Am. St. 926; S. v. Henry, 59 Iowa, 391, 13 N. W. 343; S. v. McCormack, 56 Iowa, 585, 9 N. W. 916; S. v. Zimmerman, 47 Kan. 242, 27 P. 999; Buren v. S., 16 Lea, 61; Ball v. S., 48 Ark. 94, 2 S. W. 462; Bell v. S., 57 Md. 108.

that one "who utters and publishes as true," etc., "must on conviction be adjudged guilty of forgery." Thereon there can be a conviction of forgery on proof of an uttering.[58]

§ 482. Uttering Numbers of Forged Instruments together—constitutes, by the better opinion, but one offense, not as many distinct offenses as there are instruments; thus, where one passes all, in one parcel, to a bank teller, he should be charged with the whole in one count.[59] So,—

§ 483. Possessing Numbers.—Under a statute to punish one who shall "have in possession, or receive from any other person, any forged or counterfeited promissory note or bill, etc., with intent," etc., only a single offense is committed by thus having, at one time,[59a] more counterfeit bank-bills than one, even though on different banks. And a conviction for the possession of one was adjudged a bar as to the others.[60]

§ 484. On Three Counts,—each charging the forgery of an instrument of the same tenor, if, on the trial, three like instruments are offered in evidence, the prosecutor need not show which count was for a particular one; but each count is provable by any of the three.[61]

§ 485. The Verdict,—in an old case for forging and publishing, being, says the report, "guilty *de transgressione et forgeria proed,*" it was objected to as silent as to the publication, hence insufficient. "*Sed non allocator; de transgressione proedicta* includes it." Therefore it was held good.[62] But—

58. Bishop v. S., 30 Ala. 34, 39; McGuire v. S., 37 Ala. 161; Shelton v. S., 143 Ala. 98, 39 So. 377.

59. S. v. Egglesht, 41 Iowa, 574, 20 Am. R. 612, disapproving U. S. v. Beerman, 5 Cranch C. C. 412, and S. v. Thurston, 2 McMul. 382. See Vol. I, § 437; New Crim. Law, I, §§ 1060, 1061, 1066; P. v. Ward, 15 Wend. 231; Rex v. Martin, 2 Leach, 923.

59a. Allegations of the first count for forging an instrument cannot be read with the second count for uttering it, for the purpose of supplying a defect in the second. P. v. Smith, 103 Cal. 563, 37 P. 516.

60. S. v. Benham, 7 Conn. 414.

61. C. v. Miller, 3 Cush. 243.

62. Rex v. Newton, 2 Lev. 111. Guilty of purgery and also of "uttering and attempting to pass" is good.

§ 486. 1. **The Special Finding,**—"guilty of publishing and passing the receipt in question, knowing it to be a forgery," was adjudged inadequate; because not saying whether or not it was published as true, and with intent to defraud.[64] Yet "guilty of attempting to pass the note, knowing of the forgery," was accepted; since the court will intend whatever it fairly can to sustain a special verdict.[65] These two decisions are not easily reconciled.[66] Again,—

2. **A Verdict on Two Counts,**—the one for forging a note, and the other for forging an indorsement on a note, being not guilty on the first count, and on the second, "namely, that of uttering a negotiable note knowing it to be forged, we find the prisoner guilty,"—was held too uncertain to authorize a sentence thereon.[67]

Lawrence v. S., 71 Ark. 82, 71 S. W. 263; though not stating the attempt was knowingly, wilfully and fraudulently attempted. Straggins v. S., 43 Tex. Cr. 608, 68 S. W. 170.

63. Vol. II, §§ 1006-1008.

64. Couch v. S., 28 Ga. 367.

65. S. v. Fuller, 1 Bay, 245, 1 Am. D. 610.

66. And see Page v. C., 9 Leigh, 683. Verdict need not state accused knowingly, willfully and fraudulently attempted the act. Stroggins v. S., 43 Tex. 605, 68 S. W. 170. Nor need it state the person meant to be defrauded. S. v. Leak, 80 N. C. 403.

67. Cocke v. C., 13 Grat. 750. And see Anderson v. S., 65 Ala. 553; Sprouse v. C., 81 Va. 374; Rounds v. S., 78 Me. 42, 2 Atl. 673.

For Fornication, see Stat. Crimes; Fraudulent Conveyances, see Dir. & F., §§ 481-487; Gaming, see Stat. Crimes.

CHAPTER CXXV.

GAMING-HOUSE.

Consult—for the law of this offense, New Crim. Law, I, §§ 1135-1137. For the indictment, etc., Dir. & F., §§ 805-809. And see the indexes to this series of volumes. Compare with the titles GAMING and NUISANCE.

§ 487. 1. **A Public Gaming-house**—is a species of nuisance, an offense treated of further on.[68] It is also a disorderly house,[69] the procedure for keeping which has been already explained.[70]

2. **How Chapter divided.**—We shall consider, I. The Common law Offense; II. Statutory Forms of the Offense.

I. *The Common Law Offense.*

§ 488. 1. **The Indictment**—is constructed after the manner of that for keeping a bawdy-house [71] or other disorderly house.[72]

2. **It may allege—that on, etc., at, etc.** [with or without a *continuando* [73]], the defendant, to copy from Archbold, "unlawfully did keep and maintain a certain common gaming-house, and in said gaming-house [for lucre and gain [74]], on, etc., there unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come, to play together at a certain unlawful game [specified]; and, in the said common gaming-house, on, etc., there unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain,

68. Post, § 860 et seq.

69. New Crim. Law, I, § 1135; S. v. Lovell, 10 Vroom, 463.

70. Ante, §§ 272-283.

71. Ante, § 105 (2).

72. Ante, § 273.

73. Or as at ante, § 312.

74. Doubtless unnecessary. See ante, § 274; C. v. Colton, 8 Gray, 488.

playing and gaming at the said unlawful game called, etc., for divers large and excessive sums of money;" concluding as in other indictments for keeping disorderly houses.[75]

§ 489. 1. **The Evidence**—assumes like forms and is governed by the like principles as for keeping other disorderly houses.[76]

2. **Variance.**—Allegations of the character of frequenters, games played, swearing, drinking, and the like, need be proved only in substance[77] not necessarily in exact form as laid.[78]

3. **As to what is One Offense,**—of this or any other continuous *delictum,* there are nice questions believed not to be fully settled in adjudication.[79] It has been said that keeping a gaming-house "may be a continuous act, and all the time during which" it is progressing till the law steps in, "constitutes one indivisible offense, which can be punished but in a single prosecution. Like a civil cause of action, it cannot be split up in the prosecution of it. But one penalty can be assessed."[80]

II. *Statutory Forms of the Offense.*

§ 490. 1. **The Statutes against Gaming,**—and the keeping of gaming-houses,[81] are in our States diverse and num-

75. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 637. The author adds: "This precedent was holden good in Rex v. Rogier, 2 D. & R. 431, 1 B. & C. 272. In Rex v. Taylor, 3 B. & C. 502, Holroyd, J. said that in his opinion it would be sufficient merely to have alleged that the defendant kept a common gaming-house." As to this, see ante, §§ 275, 276. See also C. v. Crupper, 3 Dana, 466; C. v. Stahl, 7 Allen, 304. For other forms of the indictment, see Dir. & F., §§ 805, 808; 3 Chit. Crim. Law, 674-677; S. v. Haines, 30 Me. 65; Lord v. S., 16 N. H. 325, 41 Am. D. 729; S. v. Maurer, 7 Iowa, 406. And see S. v. Ellis, 4 Mo. 474.

76. Ante, §§ 112-118, 278, 282. As to burden of proof in a prosecution for gambling in futures. Scales v. S., 46 Tex. Cr. 296, 81 S. W. 947, 66 L. R. A. 730.

77. Vol. II, §§ 488b-488e; ante, § 281 (2).

78. Lord v. S., 16 N. H. 325, 41 Am. D. 729.

79. Vol. I, § 402 (2), note.

80. S. v. Lindley, 14 Ind. 430, 431, by Perkins, J.

81. Stevens v. P., 67 Ill. 587; Chase v. P., 2 Colo. 509; C. v. Ballou, 124 Mass. 26. Evidence of reputation, both of the house and

erous. Not all nicely distinguish gaming-house keeping from simple gaming. Hence in the main they are treated of in the chapters in "Statutory Crimes" under the title "Gaming."[82] Something will here be given, largely in repetition of what is there said.

2. **Keeping for Gambling.**—On a statute to punish any one who should "keep a room, etc., to be used and occupied for gambling," it was unnecessary to allege that gambling took place therein; for "it is immaterial whether the prohibited establishment shall find customers or not."[83]

§ 491. 1. **For Keeping a Gambling-house,**—the indictment will vary with the statutory terms.[84] And—

2. **Location.**—It need not say how located; but if it states it to be on a particular lot, to avoid a variance it must be so proved.[85]

3. **One Day.**—Proof of keeping the gambling-house but for a single day will, on point of time, suffice.[86]

its inmates is competent. S. v. Hoyle, 98 Minn. 254, 107 N. W. 1130; S. v. Bashinski, 122 Ga. 164, 50 S. E. 54. It may be shown that accused had control of the house, that he admitted persons to it, that he derived a profit from running it, as proof that he kept in the statutory sense. Lettz v. S. (Tex. 1893), 21 S. W. 371; Harman v. S. (Tex.), 22 S. W. 1038; Wren v S., 70 Ala. 1, 4; Nelson v. U. S., 28 Ap. (D. C.) 32; Robbins v. P., 95 Ill. 175, 178; Com. v. Clancy, 154 Mass. 128, 27 N. E. 1001; Hamilton v. S., 75 Ind. 586, 591; Ford v. S., 86 Miss. 123, 38 So. 229; Groves v. S., 123 Ga. 570, 51 S. E. 627; S. v. Mathis, 206 Mo. 604, 105 S. W. 604, 121 Am St. 687n. The offense is usually regarded as continuous, so that proof of one act of possession is not enough. U. S. v. Smith, 4 Cranch C. C. (U. S.) 659, 27 Fed. Cas. 16329; Jessup v. S., 14 Ind. Ap. 230, 42 N. E. 948, but there are cases holding the contrary. S. v. Crogan, 8 Ia. 523, 524; Bryan v. S., 120 Ga. 201, 47 S. E. 574; Nelson v. U. S., 28 Ap. (D. C.) 32.

82. Stat. Crimes, §§ 844-930.

83. S. v. Miller, 5 Blackf. 502; Sowle v. S., 11 Ind. 492. See S. v. Corcoran, 73 Vt. 404, 50 A. 1110. And see Winemiller v. S., 11 Ind. 516; S. v. Staker, 3 Ind. 570. Otherwise where the indictment is, under another clause, for suffering gambling in the building. Sowle v. S., supra. And see Chase v. P., 2 Colo. 509.

84. S. v. Cure, 7 Iowa, 479; S. v. Crogan, 8 Iowa, 523. See Jones v. S., 80 Miss. 181, 31 So. 581.

85. Ante, §§ 111, 135 (1); S. v. Crogan, supra; Parkhill v. S., 47 Fla. 88, 36 So. 170; Com. v. Coleman, 184 Mass. 98, 68 N. E. 220; P. v. Stedeker, 175 N. Y. 57, 67 N. E. 132.

86. S. v. Crogan, supra.

§ 492. 1. **The Name of the Game,**—in a charge of permitting gaming in an unlicensed grocery in Indiana, need not be stated; for, by the statutory terms, it is immaterial what the game is.[87] It is the same in Texas.[88] But—

2. **The Names of the Players**—should, under the former statute, be averred;[89] under another Indiana one, against keeping a gaming-house, they need not be.[90]

§ 493. 1. **The Names of the Players,**—on an Ohio statute, must be stated;[91] not under a Texas one.[92]

2. **For Keeping a Gaming-house,**—the New Hampshire indictment need not particularly describe the house, or state the names of the players, or what games, or the amounts. It is not double to allege that the defendant kept the house on a day named, and allowed gaming in it then and on divers days and times before and after.[93]

§ 494. **In "Statutory Crimes."**—the elucidations wherein cover further ground, now reached, more of this subject appears.[94]

87. S. v. Dole, 3 Blackf. 294. See Stat. Crimes, § 896. As to description of gambling device. S. v. Briggs, 84 Minn. 357, 87 N. W. 935; Woody v. S., 113 Ga. 927, 39 S. E. 297; Slade v. S., 125 Ga. 788, 54 S. E. 750; holding game need not be particularized.

88. S. v. Ake, 9 Tex. 332; Jefferson v. S. (Tex. 1903), 22 S. W. 148; Fullerton v. S. (Tex.), 75 S. W. 734.

89. Ball v. S., 7 Blackf. 242; Sowle v. S., 11 Ind. 492.

90. Carpenter v. S., 14 Ind. 109; Dormer v. S., 2 Ind. 308. See Stat. Crimes, §§ 894, 895.

91. Davis v. S., 7 Ohio, 1st pt. 204.

92. McGaffey v. S., 4 Tex. 156; Horan v. S., 24 Tex. 161.

93. S v. Prescott, 33 N. H. 212. And see Montee v. C., 3 J. J. Mar. 132.

94. And see, for various rulings, Montee v. C., 3 J. J. Mar. 132; C. v. Lampton, 4 Bibb, 261; Buford v. C., 14 B. Monr. 24; Metz v. C., 2 Met. Ky. 14; C. v. Bolkom, 3 Pick. 281; C. v. Arnold, 4 Pick. 251; C. v. Pattee, 12 Cush. 501; C. v. Stowell, 9 Met. 572; S. v. Brice, 2 Brev. 66; S. v. Foster, 2 Mo. 210; S. v. Ames, 10 Mo. 743; S. v. Kesslering, 12 Mo. 565; S. v. Austin, 12 Mo. 576; S. v. Fletcher, 18 Mo. 425; Soltz v. P., 4 Scam. 168; S. v. Rouelle, 137 Mo. Ap. 620, 119 S. W. 55.

For Game, see Fish and Game, Dir. & F. §§ 435-440, and Stat. Crimes; Hawkers and Peddlers, see Dir. & F., §§ 508-510, and Stat. Crimes; Health Regulations, see New Crim. Law, I, §§ 489-494; Dir. & F., §§ 511-514; Highway, see Way.

CHAPTER CXXVI.

HOMICIDE, AS TO THE ALLEGATIONS COMMON TO MANSLAUGHTER AND MURDER.

Consult—for the law of self-defence and of defence of property and of family, which often arises in these cases, New Crim. Law, I, §§ 836-877. For the law of this offense, Ib., II, §§ 613-745. For some statutory homicides, Stat. Crimes, §§ 465-477. For the indictment and connected questions, Dir. & F., §§ 515-548. And see for multitudes of incidental questions, the indexes to this series of volumes.

§ 495. **Divisions of Subject.**—For clearness of exposition, and to avoid a chapter too long, the procedure in felonious homicide will be separated into several chapters.

§ 496. **How Chapter divided.**—We shall here consider, I. Historical and General View; II. The Indictment in Outline; III. Specific Questions; IV. Where there is no Assault or Battery; V. Statutory Changes of the Common law Rules.

I. *Historical and General View.*

§ 497. 1. **Changes in Law—(English).**—Adequately to comprehend the form of the indictment for a felonious homicide, we should bear in mind the early as well as the subsequent law of England, whereof the latter became common law with us. Also,—

2. **American.**—Since we are inquiring after the indictment of to-day with us, we should not overlook our own modifying statutes and decisions. As to the—

§ 498. **English—(23 Hen 8).**—Prior to 1531, the date of the statute of 23 Hen. 8, c. 1, § 3, there was in the mother country only one form of felonious homicide, being that now known as manslaughter, and including the malicious killings since termed murder.[95] All homicides now punishable were nominally capital, but clergy was allowed for all. This statute took away clergy from those committed "wilfully and of malice aforethought,' to which the name of murder was subsequently given.[96] Upon this statute, the distinction between murder and manslaughter has ever since rested, both in England and this country.[97]

§ 499. 1. **The Effect of this Statute,**—in a case which was to be excluded from clergy by force of it, upon the indictment for the homicide thereby raised to murder, was, under the rule that every fact pertaining to the punishment must appear in allegation,[98] to require the indictment to be expanded beyond its prior forms to cover the phrase "wilfully and of malice aforethought;" else, says Hawkins, "the offender shall have his clergy;"[99] in other words, the charge will be only manslaughter. But—

2. **The Conclusion "against the Form of the Statute"**—was not deemed necessary in any case where the provision, instead of creating a new offense, modified the punishment

95. New Crim. Law, II, §§ 623-628.

96. I have stated the history thus shortly that it may be easily understood. The exact words of this statute are "that no person nor persons which hereafter shall happen to be guilty after the laws of this land for any manner of petit treason, or for any wilful murder (the term murder denoting, at his period, any felonious homicide) of malice prepensed, or for, &c. (mentioning several other felonies) shall from henceforth be admitted to the benefit of his or their clergy, but utterly be excluded thereof, and suffer death in such manner and form as they should have done for any the causes or offenses abovesaid if they were no clerks; such as be within holy orders, that is to say, of the orders of sub-deacons or above, only except." And see, for explanations, New Crim. Law, II, §§ 623-628.

97. In explanation of the way in which this statute became common law in our States, consult the second edition of this volume, § 500,—the contents of which have given place to other matter in this edition. And see post, §§ 561-565.

98. Vol. I, § 77 et seq.

99. 2 Hawk. P. C., c. 33, § 25.

for an old one.[1] Hence, though there are in the books distinctions which might create some doubt if the question were new, it became the established practice not to attach this conclusion to the indictment for murder.[2]

§ 500. **American Changes.**—We shall see, in the chapter after the next, that precisely as the statute of 23 Hen. 8, c. 1, § 3, divided the felonious homicides into those which were thereafter called murder, and left the rest to the new name of manslaughter (the distinction between them being that the former were committed "wilfully and of malice aforethought," to be so charged in the indictment, while the latter remained where all felonious homicides were before); so in the greater number of our States has a statute created out of murder a higher form known as murder in the first degree, comprehending a part of what was murder before, and left the rest to remain what it was before the statute, under the new name of murder of the second degree. Yet to a lamentable extent have our courts, not consulting the teachings of our books of the law, or resorting to accurate reasonings, done, upon the subject of the indictment, the very highest champion blundering.

II. *The Indictment in Outline.*

§ 501. **Manslaughter and Murder**—we see, therefore, are charged precisely alike in the indictment, except that the latter is enlarged by the allegations which the statute of 23 Hen. 8, c. 1, § 3, requires,—to be treated of in the next chapter. So that the elucidations in this chapter concern equally the indictment for murder and for manslaughter.

§ 502. **A Good Outline of the Indictment,**—omitting what is made necessary by 23 Hen, 8, c. 1, § 3, when the punishment for murder is sought, appears in an old form

1. Vol. II, §§ 595-599; Stat. Crimes, § 167; 2 Hawk. P. C., c. 25, § 4.

2. 2 Hawk. P. C., c. 33, § 25. "Where any person is to be ousted of his clergy by virtue of any act of parliament, two things are always requisite: 1. That the indictment bring the fact within the statute, but need not conclude contra formam statuti," etc. 1 Hale P. C. 535. And see 2 Hale P. C. 190, 191.

for manslaughter. The needless parts will be pointed out as we proceed:—

"That A, late of, etc. (not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil), on, etc. (with force and arms), at, etc.

1. in and upon one X (in the peace of God and our said lord the king then and there being), in the king's highway there.

2. feloniously and wilfully did make an assault, and

3. a certain cart (of the value of five pounds),

4. then and there drawn by two horses (of the value of ten pounds), which he the said A was then and there driving in and along the said highway,

5. in and against the said X feloniously did force and drive, and him the said X did thereby, then and there, throw to and upon the ground, and did then and there feloniously force and drive one of the wheels, to wit, the off-wheel of the said cart, against, upon, and over the head of him the said X then lying upon the ground, and

6. thereby did then and there give to the said X, in and upon his head, one mortal fracture and contusion,

7. of which the said X

8. then and there instantly died.

9. And so the jurors, etc., do say, that the said A him the said X in manner and by means aforesaid feloniously did kill and slay, against the peace, etc."[3]

§ 503. 1. **"Seduced by Devil"**—unnecessary.[4]

2. **"With Force and Arms,"**—needless with us, whatever was the former law in England.[5] Hawkins tells us that these words were unnecessary in appeals of murder, "because they are so fully implied."[6] They would seem to be equally supplied by the other allegations in indictments for felonious homicide.[7]

3. 3 Chit. Crim. Law, 783.

4. Vol. II, § 501; Dir. & F., § 44.

5. Vol. II, § 502 (1); Dir. & F., § 43.

6. 2 Hawk. P. C., c. 23, § 85.

7. See Ib., c. 25, §§ 90-93; 2 Hale, P. C. 187; 3 Chit. Crim. Law, 751, note.

§ 504. **"In Peace," etc.**—not necessary.[8] "Perhaps he was not in peace, but fighting and breaking the peace." Yet to kill him without lawful occasion would be felony.[9] Still, on an indictment for the murder of a British subject abroad, it was deemed that assuming the allegation of his being such to be required, the words we are considering sufficed.[10]

§ 505. 1. **The Value of the Instrument**—which caused the death, or the fact of its being valueless, was formerly averred in the English indictments; because, says Hale, it "is a deodand forfeited to the king, and the township shall be charged for the value if delivered to them. But this seems not to be essential."[11]

2. **Parliament abolished,**—in 1846, by 9 & 10 Vict. c. 62, this forfeiture and the averment. With us, deodands being unknown,[12] such allegation is seldom[13] seen, certainly is never necessary.[14]

III. *Specific Questions.*

§ 506. **In this Sub-title,**—we shall consider the averments special to homicides by violence, as in the above form; thus,—

First. *How describe Person slain—"in and upon one X:"*—

1. **The Name**—must be given if known.[15] That by which he is commonly called suffices.[16] In California, an

8. Vol. II, § 502 (2); ante, § 57 (2); Dir. & F., § 47; Dumas v. S., 63 Ga. 600; S. v. Creelman, 111 La. 303, 35 So. 560.

9. Heydon's Case, 4 Co. 41a; C. v. Murphy, 11 Cush. 472.

10. Rex v. Sawyer, 2 Car. & K. 101, 113; Russ. & Ry. 294.

11. 2 Hale, P. C. 185.

12. New Crim. Law, I, § 827, 968 (2), 970.

13. S. v. Smith, Phillips, N. C. 340.

14. Dukes v. S., 11 Ind. 557, 71 Am. D. 370.

15. Hawk. P. C. c. 23, § 78; S. v. Griffin, 48 La. Ann. 1409, 20 So. 905; Johnson v. S. (Tex. Cr. Ap. 1910), 131 S. W. 582; Anderson v. S., 60 Tex. Cr. Ap. 314, 131 S. W. 1124; S. v. Meadows, 156 Mo. 110, 56 S. W. 878.

16. P. v. Freeland, 6 Cal. 96; Pyke v. S., 47 Fla. 93, 36 So. 577; P. v. Way, 191 N. Y. 533, 84 N. E.

error in the middle name was held immaterial,[17] but this might not be so everywhere.[18] The jury is to decide, under instructions from the court, whether the name averred is the true one.[19]

2. **The Addition**,[20]—the official character,[21] or the fact that such person was a human being,[22] even under a statute making the offense to consist of taking the life of a "human being," [23] need not be averred.

§ 507. 1. **If the Name is unknown**—to the grand jury, the indictment may so state instead of alleging it.[24]

1117; Falkner v. S. (Ala. 1907), 40 So. 409; Vol. II, § 686 (1).

17. P. v. Lockwood, 6 Cal. 205.

18. Vol. II, §§ 683 and note, 685. Description by initial. Hudgins v. S., 136 Ga. 699, 71 S. E. 1065; Brown v. Com., 86 Va. 466, 10 S. E. 745. If a name is once well stated a subsequent incorrect statement is not error in law. S. v. Cunniff, 70 Iowa, 217, 30 N. W. 849.

19. S. v. Angel, 7 Ire. 27.

Repetitions—of the name, to the several averments, should follow when required by the rules of pleading. Vol. II, § 689a; S. v. Brabson, 38 La. Ann. 144; Alford v. C., 84 Ky. 623.

20. Vol. II, §§ 671, 672, where it appears that the addition was required, even to the name of a party, only by the Statute of Additions, and that this statute did not extend to third persons. A needless addition may be rejected as surplusage. Vol. II, § 687. But the Alabama court held that the needless description of the person slain as a free negro cannot be rejected, and it must be proved. Felix v. S., 18 Ala. 720.

21. Boyd v. S., 17 Ga. 194; Wright v. S., 18 Ga. 383; Com. v. Phelps, 209 Mass. 396, 95 N. E. 868; Bullock v. S., 65 N. J. L. 557, 47 A. 62.

22. S. v. Stanley, 33 Iowa, 526; P. v. Vaughn, 14 Cal. Ap. 201, 111 P. 620; Cremar v. P., 30 Colo. 363, 70 P. 415; Porter v. S., 173 Ind. 694, 91 N. E. 340; P. v. Gilbert, 199 N. Y. 10, 82 N. E. 85; Fooshee v. S., 3 Okla. Cr. Ap. 666, 108 P. 554; Zunago v. S. (Tex. 1911), 138 S. W. 713; Baker v. S., 121 Ga. 592, 49 S. E. 792; Kirkham v. P., 170 Ill. 9, 48 N. E. 465; Bowers v. S., 122 Mo. 163, 99 N. W. 447; Ringo v. S., 54 Tex. Cr. 561, 114 S. W. 119; Johnson v. S., 1 Okla. Cr. 321, 97 P. 1059; Palmer v. P., 138 Ill. 356, 28 N. E. 130.

23. Bean v. S., 17 Tex. Ap. 60; Merrick v. S., 63 Ind. 327; Bohannon v. S., 14 Tex. Ap. 271; Ogden v. S., 15 Tex. Ap. 454; Palmer v. P., 138 Ill. 356, 32 Am. St. 146, 28 N. E. 130. So, that the person slain was a convict need not be stated in an indictment for killing him, though under a statute containing the word. S. v. Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200.

24. Vol. II, §§ 495 (2), 546-552; 2 Hawk, P. C., c. 23, § 78; 1 East, P. C. 345; S. v. Richmond, 42 La. Ann. 299, 7 So. 459; Johnson v. S.,

It is not indispensable even to aver the sex.[25] Thus,—

2. **For Killing a Bastard Child.**—on an indictment in this form, the child appearing at the trial to have been twelve days old and not baptized, a verdict of guilty was sustained though the mother had said she would like its name to be Mary Ann, and she had once or twice called it by this name.[26] This case proceeded on the opinion of the jury that the child was unnamed. If its name had been averred as Mary Ann, and the proof had been that it had acquired this name by reputation, the verdict would have been equally good. Now,—

§ 508. **A Bastard**—does not take the surname of its mother or its father, though by reputation it may acquire either. If it is baptized by a particular Christian name, whereby afterward it is called, an indictment for its murder, describing it by this Christian name, with the mother's surname added, is not good unless it has further acquired such surname by actual reputation.[27] "The proper description," it was said in one case, "would have been Harriet, the base-born child of the prisoner." Nor, in such a case, can an indictment charging that the name was to the jurors unknown be sustained.[28]

§ 509. **Presumably not named.**—On a charge against a single woman for killing her bastard child on the day of its birth, it was adjudged unnecessary to state its name, or that it was unnamed, or its name was unknown. For the

60 Tex. Cr. 305, 131 S. W. 1085; S. v. Sartino, 216 Mo. 408, 115 S. W. 1015; S. v. Peek, 95 Miss. 240, 48 So. 819.

25. S. v. Morrissey, 70 Me. 401; Taylor v. S., 86 Neb. 795, 126 N. W. 752; Clark v. S., 117 Ala. 1, 23 So. 671; 67 Am. St. 157; S. v. Pate, 121 N. C. 659, 28 S. E. 354; Triggs v. S., (Tex. 1899), 53 S. W. 104.

26. Rex v. Smith, 1 Moody, 402, 6 Car. & P. 151. In an indictment for the murder of a child, the name of the child must be given, or stated as not named or name unknown. Triggs v. S. (Tex. 1899), 53 S. W. 104; Puryear v. S., 28 Tex. Ap. 73, 11 S. W. 929.

27. Rex v. Clark, Russ. & Ry. 358; Rex v. Waters, 1 Moody, 457, 7 Car. & P. 250.

28. Reg. v. Stroud, 2 Moody, 270, 1 Car. & K. 187. As to homicide of bastard unnamed. S. v. Cunningham, 111 Iowa, 233, 82 N. W. 775.

judges deemed "that a bastard child had no name but by acquisition; that where the indictment stated nothing from which the duration of life for more than an instant could be necessarily inferred, there was no presumption that any name had been acquired, either by baptism or reputation; and that to state that the name was unknown to the jurors inferred that the child had acquired some name."[29]

§ 510. **Not named in Fact.**—When, therefore, the child has no name, and the grand jury are so informed, the correct allegation is, not that its name is unknown, but that it is "not named." "Not baptized" will not do; for without it, it may have a name.[30]

§ 511. 1. **The Proof of the Name**—must correspond with the allegation.[31] Thus, if it is averred to be Melville, and the name in evidence is Melvin, the variance will be fatal.[32]

2. **Where there is no Contest**—about the name at the trial, but it is assumed to be as laid, the jury may be satisfied with very little evidence.[33] But—

3. **The Deceased being described**—in the indictment as "a certain Wyandott Indian, whose name is unknown to the grand jury," it was not enough to prove the name to be unknown, he must also be shown to have been of the Wyandott race.[34]

29. Reg. v. Willis, 1 Den. C. C. 80, 1 Cox, C. C. 136, 1 Car. & K. 722. And see Reg. v. Hogg, 2 Moody & R. 380; Clarke v. S., 117 Ala. 1, 23 So. 671, 67 Am. St. 157.

30. Reg. v. Waters, 1 Den. C. C. 356, Temp. & M. 57, 2 Car. & K. 864, 3 Cox, C. C. 300; Reg. v. Bliss, 8 Car. & P. 773; S. v. Peek, 95 Miss. 240, 48 So. 819. An unborn child is not the subject of homicide at common law. S. v. Prude, 76 Miss. 543, 24 So. 871. The rule is otherwise by some statutes. Evans v. S., 48 Tex. Cr. 589, 89 S. W. 974.

31. Vol. II, §§ 488 (3), 683-689b; Crawford v. S., 112 Ala. 1, 21 So. 214; Ford v. S., 129 Ala. 16, 30 So. 27; Riley v. S., 68 Ark. 330, 58 S. W. 39; Colombo v. P., 182 Ill. 411, 55 N. E. 519; Goodlove v. S., 82 Ohio St. 365, 92 N. E. 491; Anderson v. S., 60 Tex. Cr. 314, 131 S. W. 1124; Haygood v. S., 51 Tex. Cr. 618, 103 S. W. 898.

32. S. v. Curran, 18 Mo. 320.

33. Joyce v. S., 2 Swan, Tenn. 667, 668.

34. Reed v. S., 16 Ark. 499. And see Felix v. S., 18 Ala. 720.

§ 512. Secondly. *Averring an Assault—"feloniously*[35] *and wilfully did make an assault:"*—

Battery—Assault.—Commonly, not always, a felonious homicide is committed by a battery, which includes an assault.[37] Then, of course, the battery must be alleged; and there is authority for saying that, therefore, the included assault must be also.[38] But this is contrary to the doctrine that there may be a conviction for assault on an indictment charging only a battery,[39] as well as doubtful on other grounds. Still,—

§ 513. **The Word "Assault,"**—assuming a technical charge of assault to be necessary, is not indispensable, though common and practically best.[40]

§ 514. Thirdly. *Averment of Weapon—"a certain cart:"*—

1. **The Means**—whereby life was extinguished, must be averred,[41] if known;[42] hence, if a weapon, the indictment

35. Vol. II, §§ 534-537; S. v. Emerich, 87 Mo. 110.

36. As to these two words, see post, §§ 542-548. That "willfully" is unnecessary, see C. v. Woodward, 102 Mass. 155; S. v. Arnold, 107 N. C. 861, 11 S. E. 990; S. v. Eaton, 75 Mo. 586; Daniels v. S., 76 Ark. 84, 88 S. W. 844.

37. New Crim. Law, II, § 56.

38. Lester v. S., 9 Mo. 658; S. v. Furgerson, 152 Mo. 92, 53 S. W. 427; S. v. Clark, 147 Mo. 20, 47 S. W. 886; Contra, Waggoner v. S., 155 Ind. 341, 58 N. E. 190; Ray v. S., 108 Tenn. 282, 67 S. W. 553.

39. Ante, § 57 (3).

40. Ante, § 57 (3); Reed v. S., 8 Ind. 200. And see Brown v. S., 110 Ind. 486, 11 N. E. 447; S. v. Lay, 93 Ind. 341.

41. Haney v. S., 34 Ark. 263; Drye v. S., 14 Tex. Ap. 185. Unnecessary under some of our statutes. P. v. Hyndman, 99 Cal. 1; P. v. Hong Ah Duck, 61 Cal. 387; P. v. Bemis, 51 Mich. 422, 16 N. W. 794; S. v. Shay, 30 La. Ann. 114; S. v. Morrissey, 70 Me. 401; S. v. Bartley, 34 La. Ann. 147. And see S. v. McLane, 15 Nev. 345; Sheppard v. S., 17 Tex. Ap. 74. In Wisconsin such a statute has been adjudged constitutional. S. v. Sloan, 65 Wis. 647, 27 N. W. 616; Thomas v. S., 58 Fla. 122, 51 So. 410; P. v. Lukoszus, 242 Ill. 101, 89 N. E. 749; Johnson v. Com., 111 Va. 877, 69 S. E. 1104; S. v. Gibson, 67 W. Va. 548, 68 S. E. 295. Contra by statute. Marquez v. Ter.. 13 Ariz. 135, 108 P. 258. Otherwise by statute. Com v. Jordan, 207 Mass. 259, 93 N. E. 809.

42. C. v. Martin, 125 Mass. 394.

must say what the weapon was,[43] or allege it as unknown.[44] If it describes the killing as done in a way requiring no weapon,—for example, by the use of the hands,—none other need be mentioned.[45]

2. **The Particulars of the Weapon**—as, its length and breath—need not be given; thus, it suffices to say that it was "a certain wooden stick."[46] And if stones were used, their number need not be stated.[47] A "loaded pistol" will do.[48] It need not be added that the weapon was dangerous or deadly.[49]

3. **Poisoning—is a species of assault.** And one count may charge the homicide to have been by poison and another by an instrument.[50] The quantity[51] or the defend-

43. 1 East P. C. 341; S. v. Williams, 36 Tex. 352. "By shooting against him with a gun loaded with powder and leaden balls." Lane v. S., 151 Ind. 511, 51 N. E. 1056; Green v. S., 154 Ind. 655, 57 N. E. 637; but see, S. v. Silk, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959; where it is suggested that the usual allegation is "that with the leaden balls so shot out of said" pistol the mortal wound was inflicted.

44. Wiley v. S., 46 Ind. 363; S. v. Lautenschlager, 22 Minn. 514; Rex v. Grounsell, 7 Car. & P. 788; Com. v. Howard, 205 Mass. 128; Com. v. Snell, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019; Waggoner v. S., 155 Ind. 341, 58 N. E. 190; Donahue v. S., 165 Ind. 148, 74 N. E. 996.

45. U. S. v. Holmes, 1 Wal. Jr. 1; Stockdale's Case, 2 Lewin, 220; Rex v. Culkin, 5 Car. & P. 121; Rex v. Tye, Russ. & Ry. 345; 2 Hawk. P. C., c. 23, § 84; Johnson v. Com., 111 Va. 877, 69 S. E. 1104; Hicks v. S., 105 Ga. 627, 31 S. E. 579.

46. S. v. Smith, Phillips (N. C.) 340; Hall v. S., 133 Ga. 177, 65 S. E. 400; Bowens v. S., 106 Ga. 760, 32 S. E. 666; Johnson v. S., Okla. Cr. 321, 97 P. 1059.

47. Rex v. Dale, 13 Price, 172, 9 Moore, 19, 1 Moody, 5.

48. P. v. Choiser, 10 Cal. 310. See also P. v. Steventon, 9 Cal. 273; Peterson v. S., 47 Ga. 524.

49. Jeffries v. C., 84 Ky. 237, 1 S. W. 442; Blankenship v. Com., 23 Ky. L. 1995, 66 S. W. 994; S. v. Bowles, 146 Mo. 6, 47 S. W. 892; Lee v. S., 44 Tex. Cr. 460, 72 S. W. 195; S. v. Hottman, 196 Mo. 110, 94 S. W. 237; S. v. Broussard, 107 La. 189, 31 So. 637; S. v. Laycock, 141 Mo. 274, 42 S. W. 723.

50. S. v. Baldwin, 79 Iowa, 714, 45 N. W. 297; S. v. Jones, 86 S. C. 17, 67 S. E. 160.

51. Epps v. S., 102 Ind. 539, 1 N. E. 491; Rosenberger v. S., 154 Ind. 525, 56 N. E. 914; Scott v. S., 141 Ala. 1, 37 So. 357, nor how administered, nor how it affected deceased.

ant's knowledge of its poisonous nature[52] need not be stated.

4. **The Proofs**—need sustain only the substance of the issue.[53] Thus, if at the trial the weapon disclosed is not the same as charged, yet it produced the same sort of wound, followed by the same sort of death, the averment is sustained;[54] as, "if a wound or bruise be alleged to be given with a sword, and it prove to be with a staff or axe,"[55] or charged to be with "a wooden stick," and a stone is proved,[56] the seeming variance is immaterial. So it is also where one kind of poison is averred and another proved.[57] But—

5. **This Sort of Liberty**—will not be indulged too far; and there may be some doubt where the precise bound is.[58] It has been laid down that evidence of a knife will not support an averment of a pistol;[59] still, some wounds from them would be similar, so that this proposition ought not to be accepted as universal.

§ 515. Fourthly. *Averring the Manner of using the Weapon—"drawn by," etc.:—*

52. S. v. Slagle, 83 N. C. 630. And see Osborne v. S., 64 Miss. 318, 1 So. 349.

53. Vol. II, §§ 488b-488d.

54. S. v. Lautenschlager, 22 Minn. 514; Rodgers v. S., 50 Ala. 102; S. v. Fox, 1 Dutcher, 566; S. v. Smith, 32 Me. 369, 54 Am. D. 578; P. v. Colt, 3 Hill (N. Y.) 432; Dukes v. S., 11 Ind. 557, 71 Am. D. 370; Reg. v. Warman, 1 Den. C. C. 183, 2 Car. & K. 195; Mackalley's Case, 9 Co. 65a, 67a; Rex v. Briggs, 1 Moody, 318; Rex v. Edwards, 6 Car. & P. 401; Rex v. Waters, 7 Car. & P. 250; Rex v. Grounsell, 7 Car. & P. 788; S. v. Cushing, 29 Mo. 215; Beavers v. S., 58 Ind. 530; Brown v. S., 43 Tex. Cr. Ap. 293, 65 S. W. 529; Jones v. S., 137 Ala. 12, 34 So. 681; Drummer v. S., 45 Fla. 17, 33 So. 1008; Webster v. S., 47 Fla. 108, 35 So. 584; Brown v. U. S., 2 Ind. T. 582, 52 S. W. 56; Willis v. Com., 20 Ky. L. 368, 46 S. W. 699; Medina v. S. (Tex. 1899), 49 S. W. 380; Taylor v. S., 44 Tex. Cr. 547, 72 S. W. 396.

55. 1 East P. C. 341.

56. Rex v. Sharwin, 1 East P. C. 341.

57. 2 Hale P. C. 185.

58. Rex v. Kelly, 1 Moody, 113; Rex v. Thompson, 1 Moody, 139; Rex v. Hughes, 5 Car. & P. 126; Stockdale's Case, 2 Lewin, 220; S. v. Reed, 154 Mo. 122, 55 S. W. 278.

59. Witt v. S., 6 Coldw. 5. And see Guedel v. P., 43 Ill. 226; Huckaber v. S., 159 Ala. 45, 48 So. 796.

1. **Where the Weapon was held in the Hand,**—"it," says East, "should be so alleged; which is either done by stating that it was holden in both hands, or in the right or left hand; though I do not find the grounds for this particularity; and Hawkins does not mention this in enumerating the necessary requisites in an appeal or indictment."[60] Hale deems this averment essential, and states a case wherein the indictment was quashed because it ran, "that *cum quodam gladio, quem in dextra sua tenuit, percussit,* without saying *in dextra manu.*" Archbold considers that this averment, if required, need not be proved.[62]

2. **With Us,**—this averment is common; but we have cases and statutes permitting its omission or modification.[63] Where its form was that the weapon was held "in both hands," the objection was overruled that "his" was omitted.[64] Our cases seem not to be very definite on this class of questions, but they appear to require such a setting out of the use of the instrument of death as will show its connection with the result.[65] This proposition is substantially the same as—

§ 516. Fifthly.—*The Setting out of the Blow—"did force and drive," etc.:—*

60. 1 East P. C. 341.

61. Cuppledick's Case, 2 Hale P. C. 185.

62. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 407.

63. C. v. Costley, 118 Mass. 1; Dennis v. S., 103 Ind. 142, 2 N. E. 349; Territory v. Young, 5 Mont. 242, 5 P. 248; Campbell v. C., 84 Pa. 187; Goerson v. C., 99 Pa. 388; S. v. Schnelle, 24 W. Va. 767; S. v. Smith, 24 W. Va. 814; P. v. Lukoszus, 242 Ill. 101, 89 N. E. 749. The means need not be alleged under a statute, unless an essential element. Com. v. Jordan, 207 Mass. 259, 93 N. E. 809. See also, S. v. Ranken, 150 Iowa, 701, 130 N. W. 732; holding the use of "kill" to be proper but not use of "murder." S. v. McPherson, 114 Iowa, 493, 87 N. W. 421; as to "hands." Welch v. S., 104 Ind. 347, 3 N. E. 850; Dennis v. S., 103 Ind. 142, 2 N. E. 349.

64. Ward v. S., 8 Blackf. 101.

65. Edwards v. S., 27 Ark. 493; Reg. v. Stokes, 1 Den C. C. 307, 2 Cox C. C. 498, 2 Car. & K. 536; Meiers v. S., 56 Ind. 336. And see Turns v. C., 6 Met. 224; S. v. Shelton, 223 Mo. 118, 129, 122 S. W. 732. For two cases relating to indictments for homicide by carelessly operating automobiles. See, S. v. Watson, 216 Mo. 420, 115 S. W. 1011; Schultz v. S., 88 Neb. 613, 130 N. W. 972.

1. **A Rational Connection**—must so appear between the instrument and its use as duly to conduct us to the end; namely, the mortal wound given. Thus,—

2. **The Stroke,**—where the wound proceeded from a blow, must be expressly laid;[66] even, it was said in an old report, "in all indictments of murder or manslaughter, unless in case of poisoning,"[67]—a proposition plainly subject to more exceptions than this one.

3. **Right—Left.**—The averment that the defendant struck the deceased on the *left* temple, giving him a mortal wound on the *right* temple, was held void for repugnance.[68]

§ 517. **To avoid a Variance,**—as we saw in the description of the weapon,[69] so here of its use, the substance only of the issue need be proved.[70] Yet an entirely different use will not suffice.[71]

66. S. v. Owen, 1 Murph. 452, 4 Am. D. 571. And see White v. C., 6 Binn. 179, 6 Am. D. 443; S. v. Freeman, 1 Speers, 57. Where a stab, etc., with a dirk, is averred, the consequent wounding may be stated in the participial form; thus, "giving one mortal wound," etc. Gibson v. C., 2 Va. Cas. 111. See Vol. II, §§ 556-558; Meiers v. S., 56 Ind. 336; Veatch v. S., 56 Ind. 584, 26 Am. R. 44; Rex v. Dale, 13 Price, 172, 9 Moore, 19, 1 Moody, 5; S. v. Noblett, 2 Jones (N. C.) 418.

67. Long's Case, 5 Co. 120a, 122b, 123a.

68. Dias v. S., 7 Blackf. 20, 39 Am. D. 448. So where it was charged that the accused did "strike and thrust" the deceased "in and upon the left side of the belly, and also in and upon the right shoulder, giving him then and there, in and upon the left side of the belly, and also in and upon the right shoulder, one mortal wound," the indictment "avers," said Ryland, J. "the giving of but one mortal wound by the blows and thrusts, and describes this as being given 'on the left side of the belly,' and also as being given 'on the right shoulder;' yet this wound is but of the breadth of three inches, and of the depth of six inches." Therefore it was held repugnant. S. v. Jones, 20 Mo. 58, 61. See S. v. Draper, 65 Mo. 335.

69. Ante, § 514.

70. Vol. II, §§ 488b-488d; Reg. v. Warman, 1 Den. C. C. 183, 2 Car. & K. 195; Rex v. Waters, 7 Car. & P. 250; Rex v. Spiller, 5 Car. & P. 333; Rex v. Hickman, 5 Car. & P. 151; Goodwyn v. S., 4 Sm. & M. 520.

71. Guedel v. P., 43 Ill. 226; Rex v. Martin, 5 Car. & P. 128; P. v. Tannan, 4 Par. Cr. 514; Rex v. Lloyd, 1 Car. & P. 301.

§ 518. Sixthly. *Averments as to the Wound—"in and upon his head, one mortal fracture and contusion:"*—

In Description of the Wound in England,—it appears to have been early required to state its length and depth, to enable the judges, it was said, to see that it was mortal. But where a limb or the head was cut off,[72] or a ball was sent through the entire body,[73] this averment became impossible, therefore it was not essential. Finally, in 1825, in a case where numerous bruises and lacerations by kicks and other rough handling were charged, without specifications of their several lengths and depths, the judges on looking into the precedents[74] discovered that they were not uniform, therefore "they might consider whether common sense required a statement of these particulars; and as the statement, if introduced, need not be proved, they thought it unnecessary."[75] And so the law seems to have been held continuously afterward, in all cases, whether of many wounds or of one.[76]

§ 519. **In Principle,**—were the judges surgeons, they could not tell from the length and depth of a wound whether or not it was mortal; *a fortiori,* not being experts, they cannot. In every view, its mortal nature is a question of fact, to be ascertained from the result, not its dimensions. There is no one reason, therefore, for requiring the dimensions to be averred in any case.

§ 520. **With Us,**—the North Carolina court once held the old doctrine;[77] but afterward, perhaps through pressure from a statute, it yielded to the modern English form.[78] Elsewhere, in this country, the dimensions of the

72. Heydon's Case, 4 Co. 41a, 42a.

73. Long's Case, 5 Co. 120a, 122a.

74. Rast. Ent. 263, 382; Co. Ent. 355; West. Symb. 117, 151, 153, 154, 155, 235, 260, 261.

75. Rex v. Mosley, 1 Moody, 98, 104.

76. Rex v. Tomlinson, 6 Car. & P. 370; Rex v. Turner, 1 Lewin, 177. In 1851, a statute made this question unimportant. Post, § 523. See also Wise v. S., 2 Kan. 419, 85 Am. D. 595.

77. S. v. Owen, 1 Murph. 452, 464, 4 Am. D. 571.

78. S. v. Moses, 2 Dev. 452, 463.

wound were probably never required to be alleged.[79] But—

§ 521. **Mortal.**—Since the infliction of a wound not mortal is never a felony, the indictment must charge it to be "mortal;" which is usually done by the adjective,—as "one mortal wound," etc.[80] Even in a case of murder by the laceration of the private parts of a young girl in rape, it was adjudged necessary to say, "thereby giving her one mortal wound or bruise."[81]

§ 522. 1. **As to alleging the Place of the Wound,**—the doctrine has been somewhat variable. When Hawkins wrote, it was, he says,[82] that the indictment "ought to set forth in what part [83] of the body the wound was given." For instance, "*circa pectus* seems to be vicious;[84] because it doth not ascertain the part wounded, which, for what appears, might have been the neck, arm, or belly." And to "say that the wound was in the hand, or leg, or arm, without [85] showing whether it was the right or left," did not suffice. Nor would it supply such deficiency to lay other wounds with due certainty, with a "general conclusion that the party died of the wounds above mentioned; because, the death being as much imputed to the wound that is insufficiently laid as to the others, it appears not but that it

79. U. S. v. Maunier, 1 Hughes, 412, 26 Fed. Cases 15,746; West v. S., 48 Ind. 483; Smith v. S., 43 Tex. 643; C. v. Woodward, 102 Mass. 155; Lazier v. C., 10 Grat. 708; Dias v. S., 7 Blackf. 20, 39 Am. D. 448; S. v. Conley, 39 Me. 78; P. v. Steventon, 9 Cal. 273; S. v. Green, 111 Mo. 585, 20 S. W. 304; S. v. Robertson, 30 La. Ann. 340; S. v. Blan, 69 Mo. 317. See Pittman v. S., 25 Fla. 648, 6 So. 437. But see C. v. Chapman, 11 Cush. 422; S. v. Linn, 223 Mo. 98, 122 S. W. 679; S. v. Bronstine, 147 Mo. 520, 49 S. W. 512; Walker v. S., 34 Fla. 167, 16 So. 80; Com. v. Robertson, 162 Mass. 90, 38 N. E. 25.

80. New Crim. Law, I, § 115, note, par. 3; 2 Hale P. C. 186; S. v. Conley, 39 Me. 78; C. v. Woodward, 102 Mass. 155, 160; S. v. Morgan, 85 N. C. 581; Brown v. S., 18 Fla. 472; P. v. Davis, 73 Cal. 355, 15 P. 8; S. v. Ramsey, 82 Mo. 133; S. v. Washington, 13 S. C. 453; S. v. Linn, 223 Mo. 98, 122 S. W. 679; S. v. Ballance, 207 Mo. 607, 106 S. W. 60. See P. v. Judd, 10 Cal. 313.

81. Rex v. Lad, 1 Leach, 96.

82. 2 Hawk. P. C., c. 23, § 80. In quoting from him, I omit the words which relate to appeals.

83. 2 Inst. 318.

84. Yong's Case, 4 Co. 40; Long's Case, 5 Co. 120a, 121b; 2 Hale P. C. 186.

85. Long's Case, supra.

might be chiefly owing to that which is insufficiently laid, and therefore the whole is insufficient." [86]

2. **It is adequate,**—under this old law, to say "that the wound was given in the left [87] part of the belly, or in the left part of the side, or in the left hand, or in the left arm, or in the face, or in the breast, or in the belly, or even in the fore part of the body; in which case, the word 'body' shall be understood of the trunk of the body, between the neck and thighs." So, more recently, "about the neck," which "means around it," was adjudged sufficient.[88]

§ 523. **In England,**—this question was in 1851 rendered immaterial by 14 & 15 Vict. c. 100, § 4 (re-enacted in 24 & 25 Vict. c. 100, § 6), declaring it "not necessary" to state the manner or means of the death; "but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and etc., in every indictment for manslaughter, that the defendant did feloniously kill and slay the deceased." [89]

§ 524. **With Us,**—the like result—namely, that the indictment need not aver on what part of the body was the wound—has by varying statutes in many States been reached.[90] But—

§ 525. 1. **At Common Law,**—with us, the English common law doctrine appears in substance to prevail.[91] The

86. See Wise v. S., 2 Kan 419, 85 Am D. 595.

87. Walker's Case, 4 Co. 41; Wilson v. Law, Skin. 443, 553, Carth. 331, 332; Long's Case, 5 Co. 120a, 121b; Hall's Case, Cro. Jac. 95, pl. 23; Goslen's Case, Cro. Eliz. 137, pl. 10.

88. Rex v. Culkin, 5 Car. & P. 121.

89. As to this statute and others of the like sort, see post, § 539; Whelan v. Reg., 28 U. C. Q. B. 2, 7; O'Neill v. Reg., 6 Cox C. C. 495, 496.

90. Wilkerson v. S., 2 Tex. Ap. 255; Williams v. S., 3 Tex. Ap. 123; Longley v. S., 3 Tex. Ap. 611; Jones v. S., 35 Ind. 122; Alexander v. S., 3 Heisk. 475; Whelchell v. S., 23 Ind. 89; Cordell v. S., 22 Ind 1; P. v. King, 27 Cal. 507, 87 Am. D. 95; S. v. Edmundson, 64 Mo. 398; S. v. Draper, 65 Mo. 335; P. v. Judd, 10 Cal. 313; Roberson v. S., 42 Fla. 223, 28 So. 424; Bowens v. S., 106 Ga. 760, 32 S. E. 666; S. v. Bronstine, 147 Mo. 520, 49 S. W. 512.

91. Dias v. S., 7 Blackf. 20, 39 Am. D. 448; Smith v. S., 43 Tex. 643; Nelson v. S., 1 Tex. Ap. 41;

New York court, perhaps influenced by a statute, adjudged it sufficient to say "upon the body,"—meaning the trunk, in distinction from the head and limbs,[92]—though the former adjudications of the English courts required the part of the body to be stated.[93] And this doctrine has other following.[94]

2. **In Proof,**—though the place of the wound is alleged, whether necessarily or not, it suffices that it was in any other part, producing the death averred.[95]

§ 526. **In Principle,**—since this allegation need not be proved, and so gives the defendant no information of practial value, it need not be made. Still the old rule does not differ much from the similar one concerning time.[96] And an adherence to it may be essential on the mere ground of authority.

§ 527. Seventhly. *The Wound as causing the Death—"of which the said B," etc.:—*

That the Death proceeded from the Wound—or other injury must distinctly appear in the averments.[97] Yet,

Williams v. S., 1 Tex. Ap. 465. See Stone v. P., 2 Scam. 326; Wise v. S., 2 Kan. 419, 85 Am. D. 595.

92. Ante, § 522.

93. Sanchez v. P., 22 N. Y. 147, 4 Par. Cr. 535. See S. v. Green, 7 Ire. 39.

94. S. v. Yordi, 30 Kan. 221; S. v. Sanders, 76 Mo. 35. See, further, C. v. Chiovaro, 129 Mass. 489; Bryan v. S., 19 Fla. 864; S. v. Henson, 81 Mo. 384.

95. 2 Hale, P. C. 186; 1 East, P. C. 343; S. v. Edmundson, 64 Mo. 398; Real v. P., 42 N. Y. 270; Hampton v. S., 50 Fla. 65, 39 So. 421; Freeman v. S., 50 Fla. 38, 39 So. 785; Com. v. Coy, 157 Mass. 200, 32 N. E. 4; Nelson v. S., 1 Tex. Ap. 41, 43; S. v. Crank, 2 Bailey, 66, 23 Am. D. 117; S. v. Waller, 88 Mo. 402. And see Rex v. Edwards, 6 Car. & P. 401; Reg. v. Warman, 1 Den. C. C. 183, 2 Car. & K. 195; S. v. Lucy, 41 Minn. 60; Graham v. S., 28 Tex. Ap. 582. An allegation of a wound one quarter inch wide, and four inches deep, is sustained by proof of numerous wounds caused by small shot fired from a gun, though none of them are of these dimensions. Bradham v. S., 41 Fla. 541, 26 So. 730.

96. Vol. I, § 400.

97. West v. S., 48 Ind. 483; S. v. Morgan, 85 N. C. 581; S. v. Blan, 69 Mo. 317. See Strickland v. S., 19 Tex. Ap. 518; S. v. Hagan, 164 Mo. 654, 65 S. W. 259; S. v. Robertson, 178 Mo. 496, 77 S. W. 528; S. v. McFadden, 48 Wash. 259, 93 P. 414; S. v. Keerl, 29 Mont. 508, 75 P. 362, 101 Am. St. 579.

where several poisons or wounds caused the death, it suffices to aver that it proceeded from them collectively naming any one in particular; "for," adds Hawkins, "perhaps the truth of the case might be that none of them alone, but all together, caused the death. Or the count in such case perhaps may say that the party died of the first poison or wound, and that he would have died of the second if he had not died of the first, and also that he would have died of the third if he had not died of the two first."[98]

§ 528. 1. **The Form**—is, not to say that the death was from the stroke, but from the wound;[99] as, observed Lord Abinger, "in murder by a sword, you must state the wound to be by the sword, and go on, of which wound he died, not of which sword."[1] An allegation that the prisoner inflicted on Richard O'Leary a mortal wound, of which mortal wound he did languish, and languishing did live, "on which said day, etc., at, etc., the said Richard O'Leary died," was held sufficiently to show death from the wound.[2] So,—

2. **In Evidence**,—an expert may testify that the wound caused the death.[3]

§ 529. **In Poisoning**,—the indictment may aver the administering of the poison, then state the mortal sickness, and add, "of which said mortal sickness and distemper the said, etc., on, etc., died."[4]

98. 2 Hawk. P. C., c. 23, § 83.

99. S. v. Conley, 39 Mo. 78. And see S. v. Wimberly, 3 McCord, 190; P. v. Lloyd, 9 Cal. 54; West v. S., 48 Ind. 483.

1. Reg. v. Sandys, 2 Moody, 227, 232, Car. & M. 345.

2. Lutz v. C., 29 Pa. 441; Tickle v. S., 6 Tex. Ap. 623, 641. And see P. v. Steventon, 9 Cal. 273; Kitts v. S., 70 Ark. 52, 69 S. W. 545.

3. S. v. Crenshaw, 32 La. Ann. 406; S. v. Kannish, 23 S. D. 465, 122 N. W. 420.

4. Reg. v. Sandy, 2 Moody, 227, Car. & M. 345. "Inflicted and created in decedent mortal injuries and a mortal sickness, a further description whereof is to the jurors unknown, from which injuries decedent died." S. v. Jones, 86 S. C. 17, 67 S. E. 160. Indictment must allege want of knowledge by decedent as to nature of the poison that accused by threats, or force or fraud caused decedent to swallow it and negative idea that decedent took it voluntarily. Sanders v. S., 54 Tex. Cr. 101, 112 S. W. 68.

§ 530. Eighthly. *Alleging the Time and Place of the Wound and Death respectively—"then and there instantly died:"—*

1. **The Time**[5] **and Place**[6]—should be averred after the rules in the preceding volume. Applied to these cases,—

2. **Blows on Different Days**—may, at the election of the pleader, be stated as all on one days, or as some on one and others on another.[7] So—

§ 531. **The Stroke, Wound, and Death**—must all be alleged;[8] then, as the stroke and death may be on different days, the pleader has the like option to charge them so, or as both on the same day.[9]

§ 532. **The Form of Allegation,**—where two days are stated, is ordinarily to say, after mention of the stroke and wound with time and place, "of which said mortal wound the said B, on and from the said —— day of —— [being the day when it was inflicted], until the —— day of —— [being a subsequent day], at, etc., aforesaid, did languish, and languishing did live; on which said —— day of —— [the day last mentioned], he the said B, at, etc., aforesaid, of the mortal wound aforesaid, died."[10] There is no need of thus averring that the deceased languished and languishing did live; but any other appropriate method of setting out the respective dates of the stroke and death is equally good.[11] We have seen how the form may be when

5. Vol. I, § 386 et seq.

6. Vol. I, § 360 et seq.; Buckler's Case, 1 Dy. 69a. See as to statute. Com. v. Howard, 205 Mass. 128, 91 N. E. 397; Hunter v. S., 93 Ark. 275, 124 S. W. 1028.

7. Vol. I, § 392 (2), 397 and note.

8. Ante, §§ 512, 516, 518, 527; Thomas v. S., 71 Ga. 44; Ball v. U. S., 140 U. S. 118; S. v. Sundheimer, 93 Mo. 311.

9. Vol. I, § 392 (2); S. v. Baker, 1 Jones, N. C. 267; S. v. Wallman, 31 La. Ann. 146; S. v. Ward, 74 Mo. 253. See Lazier v. C., 10 Grat. 708; C. v. Ailstock, 3 Grat. 650; S. v. Hobbs, 33 La. Ann. 226; S. v. Ward, 9 Mo. Ap. 587; S. v. Eaton, 75 Mo. 586.

10. This form is eliminated from 3 Chit. Crim. Law, 753, where even the hour of the death is stated; thus, "on which said, etc., about hour of nine o'clock in the morning, he the said B, at, etc., aforesaid, of the mortal wound aforesaid, died."

11. S. v. Conley, 39 Me. 78.

the stroke and death are charged as on the same day.[12] That form would be neater with the useless "instantly"[13] omitted;[14] otherwise it is excellent. Other methods also have been accepted as good in some of our States.[15]

§ 533. Year and Day.—A homicide is felonious only when the death takes place within a year and a day after the stroke.[16] And that it did so must appear[17] by the date or respective dates given in the allegation, otherwise the indictment will be ill.[18]

§ 534. The Place—of the death and the stroke must be averred[19] to show jurisdiction in the court, on principles

12. Ante, §§ 502, 530. Approved in many cases; for example, in S. v. Steeley, 65 Mo. 218, 27 Am. R. 271.

13. Vol. I, § 409 (3).

14. In Hardin v. S., 4 Tex. Ap. 355, 369, a form differing slightly from the one in my text (ante, § 502), but omitting "then and there" and retaining "instantly," was adjudged good. It was: "Giving to the said W., then and there, two mortal wounds, of which mortal wounds so given as aforesaid the said W. did instantly die." But it would not be safe to assume that every court would decide this question in the same way. For example, S. v. Lakey, 65 Mo. 217, where the words "did instantly die" were adjudged inadequate, appears to be directly contrary to this case. And see S. v. Testerman, 68 Mo. 408. Date of death need not be alleged. S. v. Powers, 39 Mont. 259, 102 P. 583.

15. S. v. Ryan, 13 Minn. 370; P. v. Sanford, 43 Cal. 29; S. v. Huff, 11 Nev. 17; Jane v. C., 3 Met. Ky. 18.

16. New Crim. Law, II, § 640.

17. Vol. I, §§ 403, 404.

18. 2 Hale P. C. 179; P. v. Wallace, 9 Cal. 30; P. v. Cox, 9 Cal. 32; Hardin v. S., 4 Tex. Ap. 355; S. v. Reakey, 1 Mo. Ap. 3; S. v. Dumphey, 4 Minn. 438; S. v. Lautenschlager, 22 Minn. 514; S. v. Huff, 11 Nev. 17; S. v. Mayfield, 66 Mo. 125; S. v. Sides, 64 Mo. 383. And see S. v. McDaniel, 94 Mo. 301, 7 S. W. 634; Brassfield v. S., 55 Ark. 556, 18 S. W. 1040; S. v. Williams, 31 Nev. 360, 102 P. 974; S. v. Phillips, 59 Wash. 252, 109 P. 1047; S. v. Powers, 39 Mont. 259, 102 P. 583; S. v. Champaux, 33 Wash. 339, 74 P. 557; "then and there instantly died" is a sufficient allegation of death within a year and a day. Com. v. Snell, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019.

19. Riggs v. S., 26 Miss. 51; P. v. Wallace, 9 Cal. 30; P. v. Cox, 9 Cal. 32; S. v. Coleman, 17 S. C. 473; S. v. Blakeney, 33 S. C. 111, 11 S. E. 637; Ball v. U. S. 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377; Clair v. U. S., 154 U. S. 134; Chapman v. P., 39 Mich. 357; Davidson v. S., 135 Ind. 254, 34 N. E. 972. Contra, by statute. Loyd v. S., 2 Okla. Cr. 76, 116 P. 959; Albright v. Ter., 11 Okla. 497, 69 P. 789. See, also, under a statute. Com. v. Howard, 205 Mass. 128, 91 N. E. 397.

already mentioned.[20] "And," says East, "where by Stat. 2 & 3 Edw. 6, c. 24, the party is indicted in the county where the death happened, though the stroke were given in another, yet ought the stroke to be alleged in the county where it really was."[21]

§ 535. **The Doctrine of connecting Time and Place**—by "then and there," explained in the first volume,[22] comes often into use in the indictment for felonious homicide. Some illustrations of it appear in the note.[23]

§ 536. Ninthly. *Repeating the Allegation of Killing—"in manner, etc., aforesaid, did kill," etc.:—*

The Allegation—being "And so the jurors," etc., though

20. Vol. I, §§ 51, 52, 360 et seq., 386 et seq. And see New Crim. Law, I, §§ 111-113, 143.

21. 1 East P. C. 343. And see S. v. Dunkley, 3 Ire. 116.

22. Vol. I, § 407 et seq.

23. If the averment is "that A feloniously and of his malice aforethought assaulted B, and with a sword, etc., then and there struck him, etc.," the words "feloniously and of his malice aforethought" qualify as well the stroke as the assault. S. v. Owen, 1 Murph. 452, 4 Am. D. 571. It is not error to omit "there" after "then and" in the description of the assault, if the place is averred in the same connection, and necesarily referred to. Jackson v. P., 18 Ill. 269. In muder with an axe, the time and place having been once alleged, "then and there" need not be prefixed to the stroke. Therefore it was held good to say that the defendant, William Barker, at a time and place, in and upon Mary Barker, "feloniously and wilfully and of his malice aforethought an assault did make; and that the said William Barker, with a certain axe, which he the said William Barker in both his hands then and there had and held, her the said Mary Barker feloniously and wilfully and of his malice aforethought did strike, giving unto the said Mary Barker then and there, with the axe aforesaid, in and upon the left side of the head of her the said Mary Barker, feloniously and wilfully and of his malice aforethought, one mortal wound, etc. C. v. Barker, 12 Cush. 186. See also Palmer v. P., 138 Ill. 356, 32 Am. St. 146, 28 N. E. 130. See S. v. Ranken, 150 Iowa, 701, 130 N. W. 732. "Then and there" connected with the death may be referred back to the stroke. Starr v. S., 5 Okla. Cr. 440, 115 P. 356; so as to abetting, S. v. Long, 209 Mo. 366, 108 S. W. 35; "then and there" as qualifying died, S. v. Champaux, 33 Wash. 339, 74 P. 557; P. v. Murphy, 179 N. Y. 595, 72 N. E. 1146; "instantly died" is equivalent to "then and there died." Borrega v. Ter., 8 N. M. 446, 46 P. 349; affirmed in Borrego v. Cunningham, 164 U. S. 612, 17 S. Ct. 182.

necessary in murder,[24] is probably not so in manslaughter. We shall postpone it to the next chapter.

IV. *Where there is no Assault or Battery.*

§ 537. **An Assault,**—when, as commonly, it is a step in the homicide, must be alleged;[25] yet there are felonious homicides without assault, then what does not exist need not be averred.[26]

§ 538. 1. **A Criminal Intent**—need not be alleged where the death resulted from the neglect of a legal duty,[27] for such neglect being a criminal condition of the mind, the law requires no other,[28] and this is alleged.[29]

2. **The Allegations**—vary with the case.[30] If, as often in practice, an assault is needlessly charged,[31] no harm is done. Yet, with more propriety, this averment is in other cases omitted.[32]

24. Post, §§ 548-550.

25. Ante, § 512; S. v. Clark, 147 Mo. 20, 47 S. W. 886.

26. Post, §§ 553, 554. See, as illustrative, Rex v. Ridley, 2 Camp. 650; Reg. v. Crumpton, Car. & M. 597; Reg. v. Plummer, 1 Car. & K. 600; C. v. Hartwell, 128 Mass. 415, 35 Am. R. 391; Anderson v. S., 27 Tex. Ap. 177, 11 Am. St. 189; C. v. Boston, etc. Rld., 101 Mass. 201.

27. S. v. Smith, 65 Me. 257. A design to effect death or intent to kill need not be alleged, S. v. Champeaux, 33 Wash. 339, 74 P. 557; S. v. Keerl, 29 Mont. 508, 75 P. 362, 101 Am. St. 579; S. v. Bradford, 156 Mo. 91, 56 S. W. 898; S. v. Barrington, 198 Mo. 23, 95 S. W. 235, 205 U. S. 483, 27 S. Ct. 582; S. v. Robinson, 126 Ia. 69, 101 N. W. 634.

28. New Crim. Law, I, § 313 et seq. Under a statute making it manslaughter to kill without design to do so, by a person engaged in perpetrating or attempting to perpetrate a crime not amounting to a felony, it must be alleged that accused was engaged in perpetrating or attempting to perpetrate some misdemeanor or similar crime, or was engaged in some unlawful act in the language of the statute. S. v. Whitney, 54 Ore. 438, 102 P. 288.

29. Vol. II, § 521. See Anderson v. S., 27 Tex. Ap. 177, 11 Am. St. 189; S. v. Smith, 66 Mo. 92.

30. See, besides other places cited to this section and the last, Regg v. Rugg, 12 Cox C. C. 16; S. v. Smith, 66 Mo. 92; S. v. McBride, 26 Wis. 409; Reg. v. Ryland, Law Rep. 1 C. C. 99, 10 Cox C. C. 569; Reg. v. Smith, 11 Cox C. C. 210.

31. Ferguson's Case, 1 Lewin, 181; Reg. v. Kelley, Jebb. 299.

32. Cases cited to the last section; S. v. Smith, 65 Me. 257.

§ 538 a. 1. **Where withholding Food**—or other necessaries, by one under a legal duty to provide them, causes the death, the ability should be averred.[33] Yet, in matter of form, the majority of the English judges held that such ability is sufficiently implied in the averments of legal duty and its neglect.[34]

2. **All the Elements**—of the offense in the particular instance should be set out.[35]

V. *Statutory Changes in the Common law Rules.*

§ 539. 1. **In the Foregoing Sections,**—some statutory modifications of the common law indictment are mentioned. In a few of the States there is a statute similar to the present English one, already, recited;[36] and this has been held to be constitutional, and the form permitted by it good.[37]

2. **Various other Statutory Modifications,**—differing with the States, have been provided, not necessary to be further explained.[38] Their general nature is some-

33. Reg. v. Hogan, 2 Den. C. C. 277. And see Reg. v. Chandler, Dears. C. C. 453, 6 Cox C. C. 519. Tender years, etc., should also be averred in proper cases, corresponding with the law of the offense. Post, § 583; Rex v. Ridley, 2 Camp. 650. See further as to this, S. v. Behm, 72 Iowa, 533. Indictment for causing death by starvation. S. v. McFadden, 48 Wash. 259, 93 P. 414.

34. Reg. v. Ryland, Law Rep. 1 C. C. 99, 10 Cox C. C. 569.

35. C. v. Hartwell, 128 Mass. 415, 35 Am. R. 391; S. v. Behm, supra; S. v. Smith, 66 Mo. 92; Anderson v. S., 27 Tex. Ap. 177, 11 Am. St. 189. In Jones v. S., 53 Tex. Cr. 131, 110 S. W. 741, it was held sufficient to allege that the accused committed murder in the perpetration of arson and burglary without setting out the constitutant elements of these crimes. Compare S. v. Kutzleben (Iowa, 1907), 113 N. W. 484.

36. Ante, § 523.

37. Newcomb v. S., 37 Miss. 383; Noles v. S., 24 Ala. 672; Wolf v. S., 19 Ohio St. 248; Rowan v. S., 30 Wis. 129, 11 Am. R. 559; Aikin v. S., 35 Ala. 399.

38. Vol. I, §§ 104-106; Alexander v. S., 3 Heisk. 475; Longley v. S., 3 Tex. Ap. 611; Tickle v. S., 6 Tex. Ap. 623; Peterson v. S., 47 Ga. 524; P. v. King, 27 Cal. 507, 87 Am. D. 95; P. Martin, 47 Cal. 101; P. v. Cronin, 34 Cal. 191; P. v. Bonilla, 38 Cal. 699; P. v. Weaver, 47 Cal. 106; S. v. Florenza, 28 La. Ann. 945; S. v. Anderson, 4 Nev. 265; Nichols v. S., 46 Miss. 284; Green-

what carefully considered in "directions and Forms."[39]

ley v. S., 60 Ind. 141; White v. C., 9 Bush, 178; S. v. Reakey, 62 Mo. 40; Garvey's Case, 7 Colo. 389, 49 Am. R. 358, 3 P. 903; Williams v. S., 7 Tex. Ap. 350; P. v. Hare, 57 Mich. 505, 24 N. W 843; S. v. Gibbons, 142 Iowa, 96, 120 N. W. 474; S. v. Nielson, 38 Mont. 451, 100 P. 229.

39. Dir. & F. §§ 541-546.

CHAPTER CXXVII.

HOMICIDE, AS TO THE ALLEGATIONS DISTINGUISHING COMMON-LAW MURDER FROM MANSLAUGHTER.

Consult—the places referred to introducing the last chapter.

§ 540. **The Doctrine in Brief**—appears in the last chapter; namely, that the indictment for murder consists of that for manslaughter enlarged by what will cover the operative words of the statute of 23 Hen. 8, c. 1, § 3,[40] which are "wilful murder of malice prepensed."[41] For the indictment is in effect on this statute, yet it need not conclude "against the form of the statute."[42] And since the statute simply expands the common law by the words just quoted, the common law form, thus enlarged, is, within a rule stated in the first volume,[43] adequate and proper. To illustrate,—

§ 541. 1. **A Form of Indictment**—for murder by stabbing here follows. It is constructed precisely like that for manslaughter already given,[44] as to the parts in Roman letters. Those in italics cover the above quoted clause from the statute of Hen. 8. Other ways of covering that clause might be suggested; but usage has sanctioned this one; it is convenient and brief, so that no pleader thinks of employing any other The more prominent useless allegations, pointed out in the last chapter,[45] are here omitted:—

"That A [the defendant], at, &c., in and upon one X feloniously, wilfully, *and of his malice aforethought* did make an assault; and the said A with a certain knife which he the said A in his right hand then and there had and held, the said X, in and upon the left side of the belly, between the short ribs of him the said X, then and there feloniously, wilfully, *and of his malice aforethought* did strike and

40. Ante, § 498, note; New Crim. Law, II, § 625 (2).

41. Ante, § 498.

42. Ante, § 499 (2); S. v. Harris, 12 Nev. 414.

43. Vol. II, §§ 598, 610. See S. v. McMahan (Ala. 1910), 53 So. 89.

44. Ante, § 502.

45. Ante, §§ 503-505.

thrust, giving to the said X, then and there, with the knife aforesaid, in and upon the said left side of the belly, between the short ribs of him the said X, one mortal wound; of which said mortal wound the said X, from, &c., until, &c., at, &c., aforesaid, did languish; on which said last mentioned day, the said X, at, &c., aforesaid, of the said mortal wound died; and so the jurors aforesaid, upon their oath aforesaid, do say that the said A the said X, in manner and form aforesaid, feloniously, wilfully, *and of his malice aforethought* did kill *and murder*; against the peace, &c."[46]

2. **This Chapter**—will consist chiefly of consdiering the averments put here in italics; the others were explained in the last chapter.

§ 542.—"**Feloniously.**"—Murder and manslaughter being equally felonies,[47] the criminal act should in each be laid as done "feloniously."[48]

§ 543. 1. "**Wilfully,**"—though common in the indictment for manslaughter, is believed not to be here necessary. In reason it is not.[49] And Hale, distinguishing mur-

46. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 405. I have made in the above some slight variations from the text in Archbold. See, for other forms, Dir. & F. §§ 520-527, 533-535; under modifying statutes, Ib. §§ 541-546; 3 Chit. Crim. Law, 750 et seq.; C. v. Webster, 5 Cush. 295, 52 Am. D. 711; Rex v. Tye, Russ. & Ry. 345; Rex v. Kinch, 28 How. St. Tr. 619; S. v. Conley, 39 Me. 78; Redd v. S., 69 Ala. 255; Mayes v. P., 106 Ill. 306, 308, 46 Am. R. 698; S. v. Snell, 78 Mo. 240, 242; Dwyer v. S., 12 Tex. Ap. 535; Peterson v. S., 12 Tex. Ap. 650; Palmer v. P., 138 Ill. 356, 32 Am. St. 146, 28 N. E. 130; Cudd v. S., 28 Tex. Ap. 124; S. v. Brown, 106 N. C. 645, 10 S. E. 870; Scott v. S., 31 Tex. Cr. 363, 20 S. W. 755. See also P. v. Ybarra, 17 Cal. 166; S. v. Dumphey, 4 Minn. 438; S. v. Lautenschlager, 22 Minn. 514; S. v. Reakey, 1 Mo. Ap. 3; U. S. v. Scott, 4 Bis. 29.

47. New Crim. Law, II, §§ 627, 744 (1).

48. Dearing's Case, Cro. Eliz. 193; Edwards v. S., 25 Ark. 444; S. v. Herrell, 97 Mo. 105, 10 S. W. 387; Kaelin v. C., 84 Ky. 354, 1 S. W. 594; Vol. II, § 534; 2 Hale P. C. 184, 185, 186. See S. v. Harris, 12 Nev. 414. Contra, under the Tennessee statutes, Riddle v. S., 3 Heisk. 401. As to "feloniously" see Ervington v. P., 181 Ill. 408, 54 N. E. 981; S. v. Fairlamb, 121 Mo. 137, 25 S. W. 895; S. v. Rice, 149 Mo. 461, 51 S. W. 78; S. v. Williams, 184 Mo. 261, 83 S. W. 756.

49. Ante, § 58. See, Miller v. S., 3 Okla. 575, 107 P. 948. The word willfully, it is said, may be implied from "malice aforethought," and may be dispensed with. Carroll v. S., 71 Ark. 403, 75 S. W. 471.

der from manslaughter, says the former is "always *felonice ex malitia praecogitata interfecit et murdravit,* the latter only *felonice interfecit,*" making no mention of "wilful."[50]

2. "**Unlawfully,**"—not in the above form, is unnecessary equally in common law murder and manslaughter. Even if in a statute against murder, it is sufficiently supplied in the indictment by "feloniously and of his malice aforethought."[51]

§ 544. The Words "Malice Aforethought,"—or at least their equivalent,[52] are indispensable.[53] They are the English of "malice prepensed,"[54] the exact words of 23 Hen. 8, c. 1, § 3.[55] Without them, the indictment will be only for manslaughter.[56]

50. 1 Hale, P. C., 466. See S. v. Lockwood, 118 Mo. 463.

51. Thompson v. S., 36 Tex. 326; Beavers v S., 58 Ind. 530; Jerry v. S., 1 Blackf. 395; Hunter v. S., 30 Tex. Ap. 314, 17 S. W. 414; Bean v. S., 17 Tex. Ap. 60.

52. S. v. Thurman, 66 Iowa, 693, 24 N. W. 511; P. v. Schmidt, 63 Cal. 28; P. v. Vance, 21 Cal. 400; P. v. Tamkin, 62 Cal. 468. That there can be no equivalents, see McElroy v. S., 14 Tex. Ap. 235; S. v. Arnold, 107 N. C. 861, 11 S. E. 990; Flowers v. S., 1 Ala. Ap. 262, 56 So. 98; S. v. Lee (Del. 1909), 74 A. 4; S. v. Miele (Del. 1909), 74 A. 8.

53. S. v. Scott, 38 La. Ann. 387; McElroy v. S., supra. It is not necessary to charge that the malice was express. Giebel v. S., 28 Tex. Ap. 151, 12 S. W. 591. And see S. v. Jones, 45 La. Ann. 1454, 14 So. 218; S. v. Brown, 168 Mo. 449, 68 S. W. 568; Buchanan v. S., 97 Miss. 839, 153 So. 899; Com. v. Mosser, 133 Ky. 609, 118 S. W. 915; Etheridge v. S., 141 Ala. 29, 37 So. 337; Rocha v. S., 43 Tex. Cr. 169, 63 S. W. 1018. In the following cases, some under statutes, the words have been dispensed with. Johnson v. P., 33 Colo. 224, 80 P. 133, 108 Am. St. 85; Williams v. S., 45 Fla. 128, 34 So. 279; Lindsey v. S., 69 Ohio St. 215, 69 N. E. 126; S. v. Tommy, 19 Wash. 270, 53 P. 157.

54. Rex v. Kinch, 28 How. St. Tr. 619.

55. Ante, § 540.

56. 1 East, P. C. 345; 1 Hale, P. C. 466; 2 Hale, P. C. 187, 344; C. v. Gibson, 2 Va. Cas. 70; Maile v. C., 9 Leigh, 661; Anderson v. S., 5 Pike, 444; Henrie v. S., 41 Tex. 573; S. v. Phelps, 24 La. Ann. 493 (overruling S. v. Heas, 10 La. Ann. Ann. 195); Witt v. S., 6 Coldw. 5.

Malignant heart, etc. The words "without just cause or provocation, but with an abandoned and maligant heart," are not an adequate substitute for "malice aforethought." P. v. Urias, 12 Cal. 325. See S. v. Neeley, 20 Iowa, 108.

§ 545. **"Wilfully" in Murder.** This statute of Hen. 8[57] containing "wilfully," it might seem to be required in the allegations for murder, to cover fully its terms. Yet there is ground to question this, because the expression "malice aforethought" appears to be of like meaning, but more intense, so as to supply its place.[58] And the subsequent 1 Edw. 6, c. 12, § 10, a. d. 1547, which is a re-enactment of Hen. 8, removes all doubt. It takes away clergy from defendants "attainted or convicted of murder of malice prepensed," omitting "wilful." Though it did not repeal the statute of Henry, which was repealed only in 1827, by 7 & 8 Geo. 4, c. 27, § 1, it stood with it;[59] and in 1828 it was by 9 Geo. 4, c. 31, § 1, made to give way to a consolidation of laws. Hence,—

§ 546. **This Word "Wilfully,"**—alike in reason and on such authorities as we have,[60] is not important.

§ 547. **To what Averments "Malice aforethought."**—Ordinarily the indictment lays the assault and each several act contributing to the death, as done "wilfully and of malice aforethought." Yet it sufficed to say that on, etc., at, etc., the defendant "in and upon" the deceased "did make an assault," and with a weapon named, "then and there feloniously, wilfully, and of his malice aforethought did strike and bruise" him, etc.; charging the battery only,

57. Ante, § 540.

58. Vol. II, § 613 (5); ante, §§ 42, 43, 58, 548 (1). That "malice aforethought" will supply the place of "willful" seems necessarily to follow from ante, § 43 (1).

59. I have forborne mention of this statute of Edward until this place, in order to preserve simplicity of statement. Starkie (2 Stark. Crim. Pl. 2d Ed. 386, note) says it repealed the statute of Henry. But it is only necessary to read it to see that it did not. Nor do the other English writers—for example, 1 Hale, P. C. 466—treat the statute of Henry as thus repealed; nor did the legislature that repealed it in 1827. This permitting statutes, of different dates and in nearly or exactly the same words, to stand together, is common in English legislation.

60. 1 Hale, P. C. 466, as quoted ante, § 543 (1); Heydon's Case, 4 Co. 41a, where the indictment, without "willfully," was held good, though the exact point was not raised; S. v. Harris, 27 La. Ann. 572. Subsequently, "wilful" has been adjudged unnecessary. S. v. Arnold, 107 N. C. 861, 11 S. E. 990.

not the assault, to have been of malice aforethought.[61] To say simply that the wound was inflicted of malice aforethought is not good.[62] If these words are prefixed to assault, they in meaning extend on and qualify the battery also.[63] Thus, an averment that on, etc., at, etc., the defendants feloniously and of their malice aforethought made an assault upon X, and then and there feloniously struck the said X, and then and there gave the said X a mortal wound, is sufficient; for "feloniously and of their malice aforethought" refer to the subsequent words, "otherwise too much repetition and tautology would be made of the said words."[64]

§ 548. *Concluding Summary—"and so, etc., feloniously, wilfully, and of his malice aforethought did kill and murder:"—*

"**Murder,**"—being one of the effective words of the statute, whether of 23 Hen. 8, c. 1, § 3, or of 1 Edw. 6, c. 12, § 10,[65] must be also in the indictment; for, says Hale, "the party indicted must be brought within the very letter of the statute." In the absence of this word, the charge will

But it is required by the Louisiana statute. S. v. Williams, 37 La. Ann. 776, overruling S. v. Harris, supra. Daniels v. S., 76 Ark. 84, 88 S. W. 844; S. v. Voorhies, 115 La. 200, 38 So. 964. The killing must be alleged to have been wilful though the assault may not have been. S. v. Dunn, 116 Ia. 219, 89 N. W. 984; S. v. Gray, 116 Ia. 231, 89 N. W. 987.

61. C. v. Chapman, 11 Cush. 422.

62. C. v. Gibson, 2 Va. Cas. 70.

63. 1 East P. C. 346.

64. Heydon's Case, 4 Co. 41a. East mentions the following case: An indictment for murder by poisoning charged that the defendant "did wilfully, feloniously, and of her malice aforethought mix poison, to-wit," etc., "with intent that the same should be afterwards baked and eaten by the deceased, and the said flour and milk so mixed with the poison as aforesaid did, with the intent aforesaid, then and there deliver to the deceased," etc. This indictment was sustained by all the judges, without its repeating "feloniously and of her malice aforethought" to the charge of the delivery of the poison. "For they considered that those words first mentioned ran through the subsequent allegation, coupled as they were by the word and, and the words then and there." Rex v. Nicholson, 1 East P. C. 346. And see Maile v. C., 9 Leigh, 661.

65. Ante, §§ 540, 545.

be only of manslaughter.[66] This is common law with us; but we have statutes against murder not containing the word, an indictment whereon may therefore be good without it.[67]

§ 549. 1. **The Form for this,**—given with the rest of the indictment in a preceding section, is, as there said,[68] universal in practice, though doubtless the words might be supplied by others.

2. **Harmonious in Dates.**—Hawkins says: "If the assault and stroke be alleged in the premises on the tenth of December, and the death subsequent on the twentieth of December following, and then it be alleged in the conclusion that the defendant in such manner feloniously murdered the party on the tenth of December aforesaid, the whole is nought for the repugnancy; because the party could not be said to have been murdered till he was dead. And though to some purposes, by a fiction of law, the offense of the defendant, after the death of the party, is punished as a felony from the time of the stroke, yet, in truth and propriety of speech (which must be observed in legal proceedings), it is not a felony, but only a trespass, till the death. Yet if, in such conclusion, it had been alleged that

66. 2 Hale P. C. 344; Anonymous, 3 Dy. 304, pl. 56; S. v. Heas, 10 La. Ann. 195; 1 Chit. Crim. Law, 243. See Evans v. P., 12 Mich. 27; S. v. Phelps, 24 La. Ann. 493; S. v. Meyers, 99 Mo. 107, 12 S. W. 516; S. v. Stacy, 103 Mo. 11, 15 S. W. 147; Hawley v. C., 75 Va. 847; Trayler v. S., 101 Ind. 65.

Suicide—degrees. In Williams's edition of Saunders's Reports, the editor mentions the doubt whether it is necessary for the inquisition, in a case of suicide, to use the word "murder." And he adds: "This is not like the case of killing another person, where there are different degrees, subject to different punishments, or perhaps not punishable at all, according to the circumstances of the case. There it is necessary, in inquisitions or indictments, to express the degree of offense; and if it be murder of which the party is accused, to use the word murdravit, which is held essentially necessary to distinguish it, in order to oust the offender of his clergy." 1 Saund. Wms. Ed. 356, note.

67. Anderson v. S., 5 Pike, 444. And see S. v. O'Neil, 23 Iowa, 272; S. v. Noah, 20 N. D. 281, 124 N. W. 1121; Hocker v. Com., 33 Ky. L. 944, 111 S. W. 676.

68. Ante, § 541 (1).

the defendant in such manner feloniously murdered the party on the twentieth of December aforesaid, it had been sufficient. But—

3. **No time and Place.**—"It," continues this author, "is said to be the better way to conclude generally that the defendant in such manner feloniously murdered the party;" omitting time and place.[69] Such is now the settled better and sufficient form.[70]

§ 550. 1. **The Sufficiency**—of such dateless conclusion appears from the consideration, already stated, that its purpose is simply to cover the statutory word "murder." Every essential act and intent having been already given with time and place, there is no occasion to repeat them here. Hence,—

2. **In Manslaughter**—this conclusion is in no form necessary.

§ 551. *Against Principals of the first and Second Degrees:*—

Already—we have considered of this indictment in general.[71]

§ 552. Some Particulars—are given in a note.[72]

69. 2 Hawk. P. C. c. 23, § 88. And see Wrote v. Wiggs, 4 Co. 45b; 2 Inst. 318.

70. Ante, § 541 (1); Rex v. Thurston, Trem. P. C. 7; S. v. Conley, 39 Me. 78; Smith v. S., 1 Kan. 365. But the name of the murdered person must be here given. S. v. Pemberton, 30 Mo. 376; Dias v. S., 7 Blackf. 20, 39 Am. D. 448. "And the jurors," etc., omitting "so," is adequate. S. v. Moses, 2 Dev. 452.

71. Ante, §§ 3, 5 and note 6, 6a. And see, for forms, 3 Chit. Crim. Law, 756; Rex v. Green, Trem. P. C. 6. See also Davis v. S., 3 Tex. Ap. 91; Hawley v. C., 75 Va. 847.

72. It was in one case averred that on the 19th of July A struck X a mortal blow; that X languished until the 1st of August, then died; that C was present on the day first aforesaid, aiding and abetting; "and so the jurors, etc., do say that the said A and C the said X in manner and form aforesaid, then and there, etc., did murder." It was held that the indictment was good; that the words "then and there" referred to the consummation of the murder, their application not being limited to the day when the blow was struck; or, if this was uncertain, they might be rejected as surplusage. S. v. Huggins, 12 Rich. 402. In another case, it alleged that the mortal wound was inflicted on the 8th of September, and the death

§ 553. *In Murder by Poison:*[73]

The Common law Indictment—is constructed on the same principles as for murder by a battery. It may charge that the defendant, on, etc., at, etc., to quote from Archbold's form, "feloniously, wilfully, and of his malice aforethought a large quantity of a certain deadly poison, called white arsenic, to wit, the quantity of two drachms of the said white arsenic,[74] did put, mix, and mingle into and with a certain quantity of beer, which the said B was then and there about to drink," adding a knowledge of B's intent to drink the beer, and of the fact that the white arsenic is a deadly poison; "and that the said B afterwards, on, etc., at, etc., did take, drink, and swallow down a large quantity, to wit, half a pint, of the said beer with which the said white ar-

was on the 13th; proceeding, "and the said C then and there, etc., was present, aiding," etc. There was held to be no uncertainty as to the date to which "then and there" referred. Woodsides v. S., 2 How. (Miss.) 655. An indictment against A, B, and C, for the murder of X, charged that the assault was committed by A "feloniously, wilfully, and of his malice aforethought;" that B and C "feloniously were present aiding, abetting, and assisting the said A the felony to commit;" and the conclusion was that "the said A, B, and C said X, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought did kill and murder," etc. This was adjudged good; it not being necessary to aver that B and C were wilfully and of their malice aforethought present, aiding, etc. S. v. Rabon, 4 Rich. 260. See also Reg. v. Phelps, Car. & M. 180; U. S. v. Douglas, 2 Blatch. 207; C. v. Chapman, 11 Cush. 422; Reg. v. Tyler, 8 Car. & P. 616.

73. Archbold says: "Of all the forms of death by which human nature may be overcome, the most detestible is that of poison; because it can of all others be the least prevented either by manhood or forethought. 3 Inst. 48. And therefore, in all cases where a man wilfully administers poison to another, 1 Hale, 455, or lays poison for him, and either he or another takes it, and is killed by it, Ib. 466, the law implies malice, although no particular enmity can be proved. 4 Com. 34; S. v. Evans, 1 Marv. (Del.) 477, 41 A. 136. So if a person knowingly give poison to A to administer as a medicine to B, but, A neglecting to do so, it is accidentally given to B by a child or other unconscious agent, this is in law a poisoning by the party himself, as much as if he had administered it with his own hands. Reg. v. Michael, 2 Moody, 120, 9 Car. & P. 356." Archb. Crim. Pl. & Ev. 10th Lond. Ed. 412.

74. Quantity is not necessary. Ante, § 514 (3).

senic was so mixed and mingled by the said" defendant as aforesaid, the said B not knowing of the existence of the poison in the beer; "by means whereof he the said B then and there became sick and greatly distempered in his body [mortally sick and distempered in his body[75]]; and the said B of the poison aforesaid, so by him taken, drunk, and swallowed down as aforesaid, and of the [mortal] sickness occasioned thereby, from, etc., until, etc., at, etc., did languish," etc. [as in the form ante, § 541].[76]

§ 554. 1. **Assault.**—Though this form charges neither an assault nor a battery, its omission does not render it ill;[77] nor would its insertion.[78]

2. **The Intent to Kill**—is common in allegation, but not necessary.[79]

§ 555. **The Kind of Poison,**—Hale says, must be alleged; but proof of another kind "maintains the indictment, for the kind of death is the same."[80] The principle has been already explained.[81] It has been even held that the kind need not be averred; then, *a fortiori,* though it is, it need not be proved.[82]

75. The pleader will do well to substitute these words for Archbold's. See ante, § 521. It was so done in P. v. Hartung, 4 Par. Cr. 256, 258, and Reg. v. Sandys, 2 Moody, 227, 228, Car. & M. 345.

76. Archb. Crim. Pl. & Ev. 10th Lond. Ed. 432, 433. This author adds. "An indictment which charges only that by means of the taking and swallowing of the poison, the deceased 'became mortally sick and distempered in his body,' 'and of the said mortal sickness died,' is good without stating that he died 'of the poison aforesaid.' Reg. v. Sandys, Car. & M. 345, 2 Moody, 227." For a form not greatly dissimilar, see Marshall v. S., 5 Tex. Ap. 273. And see Madden v. S., 1 Kan. 340; Rex. v. Weston, 2 How. St. Tr. 911; Dir. & F., § 533.

77. Ante, § 538 (2).

78. C. v. Hersey, 2 Allen, 173.

79. C. v. Hersey, supra.

80. 2 Hale P. C. 185. And see Reg. v. Pigeonary, 7 Mod. 149.

81. Ante, § 514 et seq.

82. Carter v. S., 2 Ind. 617. An indictment for administering poison with fatal result, need not allege that it was not knowingly and voluntarily received and swallowed, Siple v. S., 154 Ind. 647, 57 N. E. 544; or that it was unlawfully done, Morrison v. S., 40 Tex. Cr. 473, 51 S. W. 358; or that accused knew the deadly character of the drug employed by him, Morrison v. S., 40 Tex. Cr. 473, 51 S. W. 358; or

§ 556. **The Taking into the Stomach**—must in some way appear in averment, though the form of words is not material. Where, in Minnesota, a statute in a measure influenced the allegation, it was adjudged adequate to say that the defendant murdered the deceased "by administering to him the poison." [83] In an early English case, all the judges held an indictment ill, "principally," says Coke, for failing expressly to allege "that the said Ridley received and drank the said poison." Words merely implying the receipt of it are not enough; "for the matter of the indictment ought to be full, express, and certain, and shall not be maintained by argument or implication, because the indictment is found by the oath of laymen." [84]

§ 557. *In Murder by Starving:*—

The Indictment—is constructed like that for other murders, but in conformity to the special facts. These facts differ, so that there is no one form universally appropriate.[85]

§ 558. 1. **Duty.**—If the defendant's guilt came from neglecting or violating a legal duty,—as, to furnish food, clothing, or shelter,—such duty must be alleged.[86] For example,—

2. **Against a Married Woman,**—for the murder even of her illegitimate child, by neglecting to supply food to it,

that the substance was a poison, Scott v. S., 141 Ala. 1, 37 So. 357 or how it was administered. Scott v. S., 141 Ala. 1, 37 So. 357.

83. Bilansky v. S., 3 Minn. 427, 435.

84. Vaux's Case, 4 Co. 44a. Mr. Thomas has the following note: "When this case was cited in Rex v. Aylett (Mich), 26 Geo. 3, Mr. Justice Buller said it had been considerably shaken; for, on his authority, a motion was made in arrest of judgment in Rex v. Ring, 1 Vent. 23; and although in that book the decision does not appear, yet in 3 Keb. 51 the rule for arresting the judgment was discharged. MS. note of the late H. Bosanquet, Esq., of Lincoln's Inn."

85. See, for forms, Matthews Crim. Law, 499; Archb. Crim. Pl. & Ev., 10th Lond. Ed. 431; 3 Chit. Crim. Law, 777; Reg. v. Bubb, 4 Cox C. C. 455. Compare with Dir. & F., §§ 520, 525, 530.

86. Reg. v. Edwards, 8 Car. & P. 611; Rex v. Ridley, 2 Camp. 650; Reg. v. Crupton, Car. & M. 597; Reg. v. Pinhorn, 1 Cox C. C. 70. And see ante, § 538a.

the indictment must aver that the husband had provided the food; because, said the learned judge, "in these cases the wife is in the nature of the servant of the husband. It does not at all turn upon her natural relation of mother." Then the neglect may be alleged against her. "There is no distinction between the case of an apprentice and that of a bastard child."[87]

§ 559. **Variance**—must be avoided; as, where the charge was an assault by the defendant on his wife, a removal of her by force from his dwelling-house, and then leaving her, whereby she came to her death, it was not supported by proof that he beat her and went to bed, whereupon she voluntarily left the house and remained needlessly exposed in the open air.[88]

87. Rex v. Saunders, 7 Car. & P. 277, 279, before Alderson, B.

88. S. v. Presler, 3 Jones, N. C. 421.

CHAPTER CXXVIII.

HOMICIDE, AS TO THE INDICTMENT AND VERDICT FOR MURDER UNDER STATUTES DIVIDING IT INTO DEGREES.

Consult—the places cited introducing the chapter before the last.

§ 560. **How Chapter divided.**—We shall consider, I. The Indictment; II. The Verdict.

I. *The Indictment.*

§ 561. 1. **In "Directions and Forms"**—an exposition of this subject is given, condensed yet sufficiently full and plain to satisfy inquirers who will carefully read it and *look* and *think*.[89] Still, in the present condition of judicial things, the unfoldings of this sub-title, which is longer than the author would wish, become indispensable.

2. **The Statutes,**—dividing murder into degrees, are shown in "New Criminal Law."[90] If the reader will compare them with the old English ones, now common law with us,[91] dividing what was felonious homicide into the two degrees afterward known as murder and manslaughter,[92] he will see that this early English legislation and our modern are in exact similitude, and they should be judicially treated alike. Thus,—

§ 562. **The Statute of Henry**—separated felonious homicides into murder and manslaughter by taking clergy from

89. Dir. & F., §§ 516, 517, 520, 522-526, 532, 546 and note.

90. New Crim. Law, II, §§ 723-725.

91. That is, 23 Hen. 8, c. 1, § 1, and 1 Edw. 6, c. 12, § 10. Ante, §§ 544, 545.

92. Ante, § 498 and note, 545 and note.

those committed of "malice aforethought;" making them murder, and leaving the rest to be manslaughter.[93] Precisely so did, for example, a Massachusetts statute provide that "murder committed with *deliberately premeditated* malice aforethought" should be murder in the first degree, leaving all murder not within the words "deliberately premeditated" to be murder in the second degree.[94] Hence,—

§ 563. **As the Indictment for Murder**—was framed by incorporating into the settled form for felonious homicide the words of the statute of Henry, leaving the unaltered old to remain an indictment for manslaughter;[95] so, in reason and sound law, should the indictment for murder in the first degree, under an American statute like that above stated, be made from the indictment for murder, simply by incorporating into it the statutory words, and leaving the unaltered old to remain an indictment for murder in the second degree.[96] Thus,—

§ 564. **Under the Statute we are considering,**—an ordinary indictment for murder, as settled before its enactment, charges murder in the second degree. To take from it the averment "with malice aforethought" reduces it to an indictment for manslaughter. To prefix to "malice aforethought" the words "deliberately premeditated" raises it to an indictment for murder in the first degree.[97]

93. Ante, §§ 498, 499.

94. New Crim. Law, II, § 725 "deliberately" defined. S. v. Davis, 226 Mo. 495, 126 S. W. 470.

95 Ante, §§ 540, 541.

96. Ante, § 500. This is made plain by forms in Dir. & F. for example, at § 517, 520.

97. For further illustration, the reader can look into Green v. C., 12 Allen, 155, wrongly decided because the judgment was for murder in the first degree, and neither the words "deliberately premeditated" nor any substitutes appeared in allegation. He will see at a glance the effect of adding these words, and the different effect of abstracting "malice aforethought." For other forms, see Robbins v. S., 8 Ohio St. 131; S. v. Wood, 53 N. H. 484; Dukes v. S., 11 Ind. 557, 71 Am. D. 370; Veatch v. S., 56 Ind. 584, 26 Am. R. 44; Johnson v. P., 33 Colo. 224, 80 P. 133; S. v. Dyer, 147 Iowa, 217, 124 N. W. 629; S. v. Ireland, 72 Kan. 265, 83 P. 1036; P. v. Serimarco, 202 N. Y. 225, 95 N. E. 553; Williams v. Ter., 13 Ariz. 306, 114 P. 556; S. v. Clay, 201 Mo. 679, 100 S. W. 439; S. v. Barnett, 203 Mo. 640, 102 S. W. 506.

§ 565. The Conclusion "against the Form of the Statute,"—as it was not necessary in the indictment for murder under the statute of Henry,[98] so it is not in this for first-degree murder.[99] For neither the statute of Henry nor this American one is regarded as creating a new offense;[1] each simply regulates the punishment of what was before indictable at the common law, according to the mental condition of the offender. And the distinction is that every fact which enters into the punishment of any offense, whether at the common law or not, must be averred;[2] but not, therefore, is the indictment to conclude in all cases against the form of the statute.[3]

§ 566. *Ill-considered Legislation as to the Procedure and Form of the Indictment, and how interpreted:—*

If our Statutes—had been kept within the proper limits of legislation, simply providing the rule of law and leaving the procedure to the ordinary course, it is not probable that even courts unfamiliar with criminal pleading would have had much difficulty with them. But they went further; and undertook to say what, in some respects, the procedure should be. Then the judges, looking upon it as something new, whether really so or not, were embarrassed, and led into utterances and even decisions, some of which are extraordinary. Not all have erred. But the errors made are of the disastrous sort, disturbing even the foundations of our jurisprudence, and violating guaranties written in our constitutions. Thus,—

§ 567. 1. The Parent American Statute,—being the Pennsylvania one of 1794, after saying what murders shall be of each degree,[4] proceeds: "And the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court

98. Ante, § 499 (2).

99. White v. C., 6 Binn. 179, 6 Am. D. 443.

1. Ante, § 499 (2).

2. Vol. I, § 77 et seq., 98a, 102.

3. Vol. II, § 596-598.

4. New Crim. Law, II, § 723.

shall proceed by examination of witnesses to determine the degree of the crime, and to give sentence accordingly."[5]

2. **In the other States,**—the statutes which have adopted this sort of legislation depart more or less from this form; as, in Tennessee, that of 1829 provides that if the defendant confesses the charge, the court, instead of itself passing on the question of fact, "shall proceed by the impanelling of a jury and examination of testimony to find and determine the degree of the crime, and to give sentence accordingly."[6] It contains also the express provision that the common law forms of the indictment shall be sufficient.[7] And in some of the States the statutes in pretty direct terms declare the indictment for the first degree of murder good without any allegation of the facts which in law constitute it such.[8] Now,—

§ 568. **In mere Interpretation,**—a statute, the unwritten law, and the written constitution should be read together, and given the meaning which the combined provisions indicate.[9] Especially should not the statute, unless by words which cannot be bent otherwise, be suffered to overturn a fundamental principle in our jurisprudence; for if the legislature had intended this, it would have said so in terms unequivocal and direct. More especially should it not be rendered in a way to become null by violating the written constitution, when any other meaning is possible, or when it can be made unobjectionable by incorporating with it a principle of the constitution or of the common law.[10] Thus,—

§ 569. 1. **Determining Degree.**—It being a rule both of the common law and of our written constitutions[11] that allegation must precede proof, and without the former the latter cannot be produced, the provision that the jury shall

5. Pa. Stat., April 22, 1794, § 2.

6. Tenn Stat. of 1829, § 3.

7. Hines v. S., 8 Humph. 597.

8. Noles v. S.. 24 Ala. 672, 688.

9. Stat. Crimes, §§ 88-90, 123, 131-138.

10. See, for the leading canons of interpretation, Stat. Crimes, §§ 70-146.

11. Vol. I, §§ 77-88, 95-112, 325, 329, 331; Vol. II, §§ 509, 513a, 517-519, 521-525.

determine the degree of the murder, or the court shall when the plea is guilty, should be interpreted as applying only to a case where there is averment whereon to proceed. If the indictment does not charge the facts which constitute the first degree of murder and distinguish it from the second degree, it would be a perversion alike of justice, of the common law, and of our constitutions, to permit either the judge or jury to declare the defendant guilty in the first degree. But—

2. **Plain as are these Propositions,**—it was early and still is held in Pennsylvania,[12] that on an indictment silent as to any intent or act showing the murder to be in the first degree, a verdict and judgment of murder in this degree, to be followed by sentence of death, may be given; and in some of the other States,[13] like words have received a like interpretation; whereby conviction, sentence, and execution take pace wholly without any justifying averment. Again,—

§ 570. **Common law Form.**—A provision like the Tennessee one,[14] known also in some of the other States, that the common law form of the indictment shall be sufficient, need not and should not be construed to overturn alike the common law and constitutional requirements as to its form. What is a common law indictment for this felony? In the chapter before the last, we saw the various forms when the charge is manslaughter; and in the last chapter, we saw how the common law requires them to be expanded when the homicide is divided by a statute into degrees, making the first degree murder and leaving the second to be manslaughter. When, therefore, another statute divides murder in like manner into the first and second degrees, declaring it to be in the first degree when committed of "*deliberately premeditated* malice aforethought," the "*common law* form of the indictment" for this must contain the

12. White v. C., 6 Binn. 179, 182, 183, 6 Am. D. 443; C. v. Flanagan, 7 Watts & S. 415, 418; Johnson v. C., 24 Pa. 386.

13. For example, Davis v. S., 39 Md. 355; S. v. Millain, 3 Nev. 409.

14. Ante, § 567 (2).

words "deliberately premeditated" as well as "malice aforethought." The common law is a system of rules and principles; and to say that a form which violates its fundamental rules and most sacred principles is the "common law form" is absurd. Yet there are judicial utterances to the effect that such a form is permitted by these statutory words! [15]

15. It seems to be so, for example, in Tennessee. See and compare Poole v. S., 2 Bax. 288 (in which Turney, J., p., 29 observing that he dissents from the majority of the court, says, "In my opinion, while an indictment at common law is also good under the statute, it is only good to support a conviction for murder in the second degree, unless it contain words of like significant import with those of the statute"); Williams v. S., 3 Heisk. 37; Hines v. S., 8 Humph. 597; Mitchell v. S., 5 Yerg. 340; Mitchell v. S., 8 Yerg. 514. In Massachusetts, the provision is in slightly different words; namely, "Nothing herein shall be construed to require any modification of the existing forms of indictment." Gen. Stats. c. 160, § 6. It is interpreted the same by the judges. C. v. Gardner, 11 Gray, 438; Green v. C., 12 Allen, 155, 170. Now, in strictness, there were at the time of the passing of this statute no "existing forms" of the indictment; but it was framed in each instance after "existing" rules (in which sense the word "forms" would seem to be employed in the statute) applied to the law and the special facts. This statute simply affirms, as is common with legislation, the common law doctrine of the indictment, by permitting the old course to be continued. The course was to allege, in it, the malice which the law required to be shown in evidence. If, therefore, the "existing forms" are to be continued, and the case is one wherein "deliberately premeditated malice aforethought" must be proved, the indictment must charge it. There never had been known in Massachusetts, at the time when this statute was enacted, an indictment for murder held good if it came short of this. If the statute was not to be interpreted by the common and constitutional law, and in harmony therewith, a different conclusion might perhaps be reached. But the legislature is always presumed to mean that its enactments shall be construed by the previously existing rules; which rules, said Shaw, C. J., "are as much a part of every statute as its text." C. v. Churchill, 2 Met. 118, 124. And see Stat. Crimes, §§ 74, 75, 82, 88-90 et seq. Such is the proper interpretation of any like statute. But the Massachusetts one has another provision conclusive of this result. It is that "murder not appearing to be in the first degree is murder in the second degree." See, for the entire statute, New Crim. Law, II, § 725. If, then, the charge of a homicide is simply that it was committed of "malice aforethought," which were

§ 571. *Confused and Contradictory Language from Courts*:—

Ill-considered Words unthinkingly followed.—The unfortunate judicial conclusions, stated and to be stated in this chapter, have proceeded on no uniform line of argument. At first, a bench of excellent judges made a mistake, perhaps because not duly enlightened by reasonings from the bar; the next court tried to support the error, mistaking it for *res judicata,* and argued for it as well as mortals could, in behalf of what admitted of no sound argument; another court tried some new prop, equally weak, to sustain what could not be upheld; and thus, step by step, the muddle has proceeded. But, to specify,—

§ 572. **Punishment not changed.**—Some have admitted that every element on which the punishment for an offense depends must be averred; [16] because else, as said in one case, "the accused would not be informed of the offense with which he was charged, or of the penalty to which he was liable." And then, as in this case, they have proceeded to nullify what they thus truly said, by adding: "These reasons do not apply to a statute neither creating an offense nor enhancing its penalties, but dividing a common law offense into degrees, and diminishing the punishment." [17] Such is no uncommon way of putting the doctrine; but, outside of the cases now in review, there is not, in the whole literature of the law,—in the English books, the Irish, the American, or any other,—one decision, one *dictum*, or one utterance of any kind, to support the exception thus made to the acknowledged general rule. On the other hand, as already explained in this series of chapters, it has been settled by thousands of decisions and univer-

the former common law words, it does not "appear" to be more,—it does not "appear" to be of "deliberately premeditated malice aforethought"—does not "appear" to be in the first degree,—therefore, says the statute, it "is murder in the second degree."

16. Ante, § 565, and the places there referred to.

17. Davis v. S., 39 Md. 355, 373. And see White v. C., 6 Binn. 179, 6 Am. D. 443; C. v. Flanagan, 7 Watts & S. 415.

sal practice that when a statute does, as did 23 Hen. 8, c. 1, [3, and 1. Edw. 6, c. 12, § 10,[18] divide a felonious homicide "into degrees and diminishing the punishment" (for so, as truly understood, did those statutes deal with manslaughter), the statutory words distinguishing the degrees must be set out in the indictment for the higher. And—

§ 573. In Principle,—if the question were without authority, after a statute has divided an offense into two degrees, distinguishing them by certain words, it makes no difference as to the necessity of employing them in allegation, whether the punishment for one of the degrees is made heavier, or that for the other lighter, than was before ordained for the undivided offense. If the prosecuting power means to inflict the heavier punishment, the defendant will no more be informed of its purpose, on an indictment not pointing to either punishment, when the statute had reduced that for the inferior degree than on one raising it for the superior. It is truly a novel principle, founded on no reason, no prior authority, no forewarning *dictum*,—unheard of in all the realms of the law before,—that the form of the indictment is to be this or that, in obedience to what was once the law, but is not now! A repealed law governing present proceedings! The contrary is the established doctrine.[19] Some, not denying this, assert,—

§ 574. That "Malice aforethought" denotes Highest Degree.—Perhaps the most absurd assumption—certainly the one most readily demonstrated to be false—is that to charge a homicide as committed of "malice aforethought" is to aver that it was of "*deliberately premeditated* malice aforethought."[20] In other words, the proposition is that

18. Ante, § 498 and note, 545, 562.

19. Stat. Crimes, §§ 175, 177.

20. Green v. C., 12 Allen, 155; Hill v. P., 1 Co. 436; S. v. Lessing, 16 Minn. 75, 78; Fitzgerald v. P., 49 Barb. 122; Territory v. Banningan, 1 Dak. 451; P. v. Ah Choy, 1 Idaho, n. s. 317; S. v. Hing, 16 Nev. 307. The following cases of recent date hold that "deliberately premeditated" may be omitted being included in malice aforethought under statutes. Borrego v. Ter., 8 N. M. 446, 46 P. 349, 164 U. S. 612, 17 S. Ct. 182; P. v. Ung Ting Bow, 142 Cal. 341, 75 P. 899; Chelsey v. S., 121 Ga. 340, 49 S. E. 258; S. v.

"malice aforethought" and "deliberately premeditated malice aforethought" are exact synonyms, and the words "deliberately premeditated" mean nothing; though they are the exact and only words whereby the statute designates the first degree. To state the proposition in still other terms, ever since murder was known to our law, as a form of felonious homicide, every one of the thousands upon thousands of adjudications upon it has, whether we look to the statutes of Henry and of Edward or not, settled the doctrine that every felonious homicide is murder when committed of "malice aforethought," and every one not of "malice aforethought" is manslaughter. Now, assuming the expressions "malice aforethought" and "deliberately premeditated malice aforethought" really to be identical in meaning as thus claimed, the Massachusetts statute before quoted [21] makes "murder committed with malice aforethought" to be murder in the first degree, and all other murder, *of which there can be none,* murder in the second degree. In still another form of language, the provision is that all the felonious homicides which are committed of malice aforethought are now provided into two degrees, the first degree consisting of those committed of malice aforethought, and the second degree consisting of those not of malice aforethought. Did ever before infantile prattle like this, admirably suited to a place with Mother Goose in the nursery, put on spectacles, and ascend to the judgment seat on the judicial bench? It serves to help us retain some respect for the wisdom of the past to know that not in this shape did the early adjudications of the mistaken sort on this question startle the legal world; but it was boldly claimed that though a homicide charged simply of "malice aforethought" does not appear of the first degree, the jury in finding the first degree on such an indictment proceed, as the judges deemed they might, without averment.[22]

Schleller, 130 Mo. 510, 32 S. W. 976; S. v. Cole, 132 N. C. 1069, 44 S. E. 391.

21. Ante, § 562.

22. Johnson v. C., 24 Pa. 386; Rhodes v. C., 48 Pa. 396; Mitchell v. S., 8 Yerg. 514, 533. And see S. v. Thompson, 12 Nev. 140, 148; S. v. McGuire (Conn. 1911), 80 A. 761.

§ 575. **The Beginning**—of this particular blunder as to the meaning of words was, so far as the author has observed, in a celebrated Massachusetts case.[23] The indictment charged a murder only as of "malice aforethought," omitting the statutory "deliberately premeditated;" the court held—such was the very point on which the case turned—that a conviction of murder in the first degree, which could be only when the malice was "deliberately premeditated," followed by the death sentence, was right. It was judicially admitted and by the court claimed in this case that if the statute was construed as authorizing this conviction without allegation of the particular matter which made the murder to be in the first degree, it would be a void attempt to violate the constitution.[24] But the learned chief justice, who delivered the opinion, declared it to be "the logical and necessary conclusion from" two prior cases cited,[25] that "malice aforethought" was a synonym for "deliberately premeditated malice aforethought." So this case, without recurring to the baby reasoning stated in our last section, or to the law dictionaries, or to the overwhelming line of adjudication, and without a thought that there could be such a thing as judicial blundering, or that the words "deliberately premeditated malice aforethought" could not mean one thing in the statute and quite another thing in the indictment upon it, had recourse to a very little of a very modern "logic," and stumbled. The strange argument was that if the indictment did not charge murder in the first degree, either the statute was unconstitutional or the decision in review was wrong, hence it did! But—

23. Green v. C., 12 Allen, 155, upon Mass. Gen. Stats. c. 160, § 1, quoted New Crim. Law, II, § 725.

24. In an earlier case, the same learned chief who delivered the opinion of the court in this one well observed that a verdict cannot "be properly received and recorded, convicting the defendant of any lesser offense than the felony set out in the indictment, unless such minor offense was substantially charged by the residue of the indictment, after striking out that portion of which the defendant was acquitted." C. v. Murphy, 2 Allen, 163, 164.

25. Page 171; C. v. Gardner, 11 Gray, 438; C. v. Desmarteau, 16 Gray, 1.

§ 576. Means either—Uncertain which.—Some, under pressure of the argument, have fled to another position even less tenable. It is that the term "malice aforethought," when employed in the indictment, may mean either what it did prior to the statute, therefore indicating only murder in the second degree, or it may mean the "deliberately premeditated malice aforethought" of the first degree, according as the verdict shall be for the one degree or the other; its signification remaining in abeyance till the final disposition of the case.[26] This is informing a defendant of the "nature and cause of the accusation aganst him"[27] with a vengeance! Beyond question, the common law and our written constitutions alike demand that at the arraignment, by the finding of the grand jury, not by verdict of the petit jury after all opportunity of defense is over, the prisoner shall have disclosed to him the precise charge, not that he is accused either of one thing or else of another.[28] Yet—

§ 577. Means both.—Others put it that the term "malice aforethought" means, equally and both, "malice aforethought" as its words are, and "deliberately premeditated

26. I do not remember to have seen these exact words in any case, but their meaning may be found in many of the judicial utterances. And see Kennedy v. P., 39 N. Y. 245, 250.

27. Vol. I, §§ 88, 104, 105, 110.

28. A legal gentleman writes me: "In your various discussions relating to the usual common law form of indictment charging murder in the first degree under certain statutes, I have not observed the following argument in support of your position; namely: If the usual common law form of indictment charges both degrees equally, how can it be ascertained from the record that the grand jury have indicted a party for murder in the second degree, assuming they have done so? Or, to put it in other words, how can a grand jury indict such party for murder in the second degree, and the court judicially be apprised of it? Because I do not suppose the law contemplates that a court can look at anything else than the form of indictment." This suggestion derives its force from the idea that it is uncertain which form of murder is meant till the verdict comes in. A case is entered of record, the party is arraigned, he pleads, the evidence is heard; and after all is over, the petit jury tell the party and the judge, neither of whom knew before, what it was the grand jury had been "driving at"! Let us leave the solution of this apparent difficulty to the wisdom of the future.

malice aforethought" as its words are not; that is, it alleges murder in the first degree and murder in the second, and neither one more than the other.[29] We have seen[30] that it does not charge the higher degree, therefore it does not charge both it and the lower. Then they say that proof of either degree will satisfy the allegation. Will it? Where words may be rejected from an indictment as surplusage, proof merely of what is not thus disposed of will sustain it. But in no other way is an averment maintainable by showing less than its entire meaning. Now, if we take from "malice aforethought" anything, however minute, the indictment ceases to charge murder, it is manslaughter.[31] Hence there is no possible surplusage here; and both degrees must, if such is the meaning of the averment, be proved. In other words, murder of the first degree must always appear in evidence, so the law has ceased to know such an offense as murder in the second degree. Again,—

§ 578. **As in Murder and Manslaughter.**—Some put it that to state the killing as of "malice aforethought" is to aver both degrees of murder "in like manner," they say, "as the common law indictment charges both murder and manslaughter."[32] That this is not so appears in explanations with which this chapter opens.[33] It has also been shown that murder at the common law can be alleged only by the words "malice aforethought," nothing less sufficing.[34] If we diminish this allegation, the offense charged becomes manslaughter. If anything less than is meant by these words is proved, the offense is only manslaughter. They indicate the measure of malice which must be added to manslaughter to make murder. How, then, has their meaning become suddenly enlarged to denote the higher

29. Cluverius v. C., 81 Va. 787, 848. "The language [malice aforethought] applies as well to the second as to the first degree." Johnson v. C., 24 Pa. 386, 389. And see Hill v. P., 1 Colo. 436, and various other cases.

30. Ante, §§ 574, 575.

31. Ante, § 541 et seq.

32. S. v. Verrill, 54 Me. 408.

33. Ante, §§ 562-564.

34. Ante, § 544.

degree of malice which distinguishes the first degree of murder? and only in the indictment, not also in the statute?

§ 579. **No New Offense—The Old "divided."**—It is often said that this statute has created "no new offense," but simply "divided" the old murder into two degrees, providing for each its appropriate punishment. The two degrees, continues the utterance, still remain, as before, "one offense." Hence it is assumed, without pausing or looking to see whether there is any or what ground for the assumption, that an allegation of murder as at the common law charges equally the two degrees of murder under the statute.[35] Admitting the correctness of what is thus premised, at least for the purposes of the argument, the assumed consequence does not follow, but the reverse. The law abounds in instances wherein one offense is subjected to differing punishments, according to the aggravations attending its commission; yet always, without exception, the particular aggravating matter is required to be set out in the indictment. We saw, in the first volume, under the title "Duplicity,"[36] what is "one offense." For example, assault, battery, manslaughter, murder,[37] assault or assault and battery with intent to kill, and the same with a dangerous weapon,[38] are all one offense, chargeable in one count without making it double. Yet these varying forms of the one offense are not provable under an indictment drawn as at the common law for an assault. On the other hand, the aggravating matter must in every instance be alleged.[39] But—

35. White v. C., 6 Binn. 179, 6 Am. D. 443; Davis v. S., 39 Md. 355; C. v. Flanagan, 7 Watts & S. 415, 418; S. v. Verrill, 54 Me. 408, 415. In precisely this way, the statutes which divide felonious homicides into murder and manslaughter were said to have created no new offense; while still the courts held that the statutory words "with malice aforethought," not necessary before the division, must be employed in the indictment to justify a conviction for the higher degree called murder. Ante, §§ 499 (1), 565.

36. Vol. I, § 432.

37. Ib., § 433; ante, §§ 63, 63a, 512.

38. Ante, § 63.

39. Vol. I, § 80, 82, 83, 102; ante, §§ 63, 63a.

§ 580. **Simply Different Punishments.**—By many it is said that the statute relates *only* to the punishment, *only* provides different punishments for differing degrees of guilt; hence their conclusion, drawn without reflection or argument, that therefore the element distinguishing the degrees need not be averred.[40] But, as already shown,[41] the law draws herefrom the direct contrary result. The sole object of the indictment is punishment, the grounds for which must be alleged.

§ 581. **Not Rule of Pleading.**—It was in one case said "that the statute is not a rule of pleading, but a guide to the conduct of the trial and to the instructions to be given to the jury;" therefore, among other consequences, the matter distinguishing murder in the first degree, and making it more heavily punishable, need not be alleged.[42] This is but the old proposition, in another form, that the statute commands the court to take from the jury a verdict of guilty without allegation.[43] Under our constitutions, no court shrould suffer itself to be thus commanded.

§ 582. *Unconstitutional*:—

In the Earlier Cases—on this subject, we have seen, no question was made of the constitutionality of the statute as the courts construed it.[44] They simply took it for granted that a judge might sentence to the gallows one against whom appeared no allegation of what alone justified the

40. White v. C., 6 Binn. 179, 6 Am. D. 443; C. v. Flanagan, 7 Watts & S. 415, 418; Bergemann v. Backer, 157 U. S. 655; Graves v. S., 16 Vroom, 203.

41. Vol. I, § 77 et seq.; ante, §§ 565, 572.

42. Kennedy v. P., 39 N. Y. 245, 250. Perhaps the meaning of the court was not, in this case, as I have thus given it in the text, and "malice aforethought" was deemed to charge murder in the first degree. Where unsound reasons are employed in any argument, it is impossible for another to follow it and point out its fallacies, without subjecting himself to the possible charge of misrepresentation. I have endeavored, in the several sections above, to put the reader in a position to answer the fallacies reasoning in general, rather than trace any particular absurdity to its source.

43. Ante, §§ 569, 570.

44. Ante, §§ 567-570.

hanging.[45] Afterward some judges discovered that this was not so; and, instead of accepting the truth that the former decisions were wrong because of their overlooking what was not thought of, invented the sophistry, already pointed out, that "malice aforethought" charges "deliberately premeditated malice aforethought," since otherwise men would appear to have been hung unconstitutionally.[46] For the irregularity of taking life on a record showing nothing to justify it, was so obvious as to cause them to shrink from admitting that during many past years it had been habitually done.[47] Thus,—

§ 583. **In Massachusetts,**—on a conviction for murder in the first degree where only "malice aforethought" was alleged,[48] the court by its chief justice said, if this "form does not charge murder in the first degree, then it would follow, not only that the statute contravenes the Declaration of Rights, but it would be impossible for a jury to find a party charged on such an indictment guilty of the crime. It is an elementary principle of the criminal law that a want of averment cannot be helped by evidence, and that a jury cannot convict a person of any crime, however clearly it may be proved, unless it is duly and technically set forth in the indictment. A verdict of guilty of murder in the first degree on an indictment drawn in the form contemplated by the statute[49] would therefore be invalid and inoperative, unless it be held that the indictment in the common form does duly charge in apt and proper words this grade of the offense."[50] And other courts, in the later periods of this sort of legislation, have reached the same conclusion.[51] It was, indeed, suggested in Nevada that this may not be so under a constitution destitute of

45. Vol. I, §§ 80, 98a; ante, § 574.

46. Ante, §§ 574, 575.

47. Vol. I, § 102.

48. Ante, § 564 and note.

49. As to how this statute ought to be interpreted, see ante, §§ 568-570, note.

50. Green v. C., 12 Allen, 155, 171.

51. Vol. I, § 102.

any special provision like that in Massachusetts;[52] but it is believed that the doctrine properly admits of no such qualification.[53] Still,—

§ 584. *Judicial Determinations on the Entire Question, and Duty of the Courts:*—

That "Malice aforethought" is enough.—The seemingly greater number of our American courts, overlooking the true considerations because not pointed out to them by counsel, or refusing to examine and comprehend an argument which would satisfy them if they understood it, therefore reasoning in the muddled, confused, and contradictory way already described, have held that under our entire statutory provisions, construing those which relate to the procedure with the rest, one charged with a felonious killing of "malice aforethought" merely, may be convicted of murder in the first degree.[54] On the other hand,—

52. S. v. Millan, 3 Nev. 409, 443, 449. For the Massachusetts provision, see Vol. I, § 101.

53. Vol. I, §§ 79-84, 86-88, 98a-110.

54. S. v. Pike, 49 N. H. 399, 6 Am. R. 533 (two judges dissenting); Davis v. S., 39 Md. 355; Weighorst v. S., 7 Md. 442; Ford v. S., 12 Md. 514; S. v. O'Flaherty, 7 Nev. 153, 157; S. v. Thompson, 12 Nev. 140; S. v. Millan, 3 Nev. 409; S. v. Crozier, 12 Nev. 300; Leschi v. Territory, 1 Wash. 23; McAdams v. S., 25 Ark. 405; S. v. Dumphey, 4 Minn. 438, 443; S. v. Lessing, 16 Minn. 75; S. v. Stokley, 16 Minn. 282; Hill v. P., 1 Colo. 436; Redus v. P., 10 Colo. 208; Fitzgerald v. P., 37 N. Y. 413 (Bacon, J. dissenting, opinion at p. 685); Kennedy v. P., 39 N. Y. 245, 250; perhaps Hogan v. S., 30 Wis. 428 (Dixon, C. J., dissenting); Territory v. Stears, 2 Mont. 324; Noles v. S., 24 Ala. 672, 688 (under an express statute); C. v. Desmarteau, 24 Law Reporter, 155, 166, 16 Gray, 1, 15; S. v. Verrill, 54 Me. 408, 415; S. v. Cleveland, 58 Me. 564; C. v. Flanagan, 7 Watts & S. 415; C. v. Miller, 1 Va. Cas. 310, 311; Wicks v. C., 2 Va. Cas. 387; Livingston v. C., 14 Grat. 592, 596; P. v. Doe, 1 Mich. 451; P. v. Potter, 5 Mich. 1, 71 Am. D. 763; Slaughter v. S., 24 Tex. 410; Cockrum v. S., 24, Tex. 394; Wall v. S., 18 Tex. 682, 70 Am. D. 302; Burrell v. S., 16 Tex. 147; White v. S., 16 Tex. 206; Gehrke v. S., 13 Tex. 568; P. v. Halliday, 5 Utah, 467 (compare with Davis v. Utah, 151 U. S. 262); P. v. Giblin, 115 N. Y. 196, 21 N. E. 1062 Cargen v. P., 39 Mich. 549; Chase v. S., 50 Wis. 510, 7 N. W. 376; Sneed v. P., 38 Mich. 248; P. v. Ah Choy, 1 Idaho, n. s. 317; S. v. Hing, 16 Nev. 307; Territory v. Bannigan, 1 Dak. 451; Sharpe v. S., 17 Tex. Ap. 486; Bohannon v. S., 14 Tex. Ap. 271, 300; Penland v. S., 19 Tex. Ap. 365;

§ 585. 1. **Not enough.**—A very considerable, respectable, and constantly increasing number of our courts, though perhaps still a minority, looking more carefully into the question, hold thct the indictment, to justify a conviction for murder in the first degree, must allege whatever the statute makes essential to this degree of murder; and they have not seen that an averment of "malice aforethought" sets out, for example, "*deliberately premeditated* malice aforethought,"[55] when these words "deliberately premeditated" were used in the statute expressly to distinguish the higher degree from the lower, and provide for the higher a heavier punishment than for the lower.[56] Now,—

Green v. S., 27 Tex. Ap. 244; Graves v. S., 16 Vroom, 203 (Compare with Bergemann v. Backer, 157 U. S. 655. See Hogan v. S., 30 Wis. 428, 11 Am. R. 575; Hines v. S., 8 Humph. 597; Mitchell v. S., 5 Yerg. 340; Mitchell v. S., 8 Yerg. 514; Greer v. S., 3 Bax. 321; Witt v. S., 6 Coldw. 5; Williams v. S., 3 Heisk. 37; Poole v. S., 2 Bax. 288; P. v. Wallace, 9 Cal. 30; P. v. Cox, 9 Cal. 32; P. v. Dolan, 9 Cal. 576; P. v. Lloyd, 9 Cal. 54; P. v. Vance, 21 Cal. 400; P. v. Marquis, 15 Cal. 38; S. v. Dowd, 19 Conn. 388; P. v. Enoch, 13 Wend. 159, 27 Am. D. 197; P. v. Butler, 3 Par. Cr. 377; Bilansky v. S., 3 Minn. 427; Smith v. S., 50 Conn. 193; S. v. Hamlin, 47 Conn. 95, 36 Am. R. 54; P. v. De La Cour Soto, 63 Cal. 165; Fisher v. S., 10 Lea, 151; Taylor v. S., 11 Lea, 708, 724; S. v. McGuire (Conn. 1911), 80 A. 761; S. v. Barnett, 203 Mo. 640, 102 S. W. 506; S. v. Campbell, 24 Utah, 103, 66 P. 771; S. v. Haworth, 24 Utah, 398, 68 P. 155; S. v. King, 24 Utah, 482, 68 P. 418; Flynn v. S., 97 Wis. 44, 72 N. W. 373; Rather v. S., 25 Tex. Ap. 623, 9 S. W. 69; S. v. Marple, 15 Ore. 205, 14 P. 521; S. v. Metcalf, 17 Mont. 417, 43 P. 182.

55. Ante, § 574.

56. S. v. Lowe, 93 Mo. 547, 572-574, 5 S. W. 889; Cannon v. S., 60 Ark. 564, 31 S. W. 150, 32 S. W. 128; Jones v. S., 58 Ark. 390, 24 S. W. 1073; S. v. Townsend, 66 Iowa, 741, 24 N. W. 535; S. v. Shelton, 64 Iowa, 333, 20 N. W. 459; Denham v. S., 22 Fla. 664; Wiggins v. S., 23 Fla. 180, 1 So. 693; Simmons v. S., 32 Fla. 387, 13 So. 896; Schaffer v. S., 22 Neb. 557, 35 N. W. 384; Blanton v. S., 1 Wash. 265, 24 P. 439; Plake v. S., 121 Ind. 433, 16 Am. St. 408, 23 N. E. 273; S. v. Fooks, 29 Kan. 425; Leonard v. Territory, 2 Wash Ter. 381, 7 P. 872; S. v. Brown, 21 Kan. 38; Smith v. S., 1 Kan. 365; S. v. McCormick, 27 Iowa, 402; S. v. Watkins, 27 Iowa, 415; S. v. Boyle, 28 Iowa, 522; S. v. Knouse, 29 Iowa, 118; S. v. Thompson, 31 Iowa, 393 (holding that the full averment of malice must extend to the killing, and not alone to the assault; Fouts v. S., 4 Greene (Iowa), 500 (sometimes supposed to have been overruled by S. v. Johnson, 8 Iowa, 525, 74

2. **Majority—Minority.**—This is one of those rare yet supremely important questions, which are in no wise influenced by the number of courts or of jurists on the one side or the other. In a case like this, as now and then of some others, no number of unanimity of decisions from a court, high or low, can make law of a contradiction, or of an impossibility, or of anything else contrary to what God has built into our framework of things.[57] If all earthly tribunals should concur in holding that the sun rises in the west and sets in the east, still this luminary of heaven would come up fresh every morning and proclaim from his seat in the east, as he always has done, that God's will is superior to the devices of man. Or if any number of our tribunals should undertake to overturn the doctrine, as a probable majority, we have seen in this sub-title, has undertaken, that the part of a thing is less than the whole, still the boy who should give his companion the half of an apple saying it was the whole of it, "for so my papa, who is a lawyer and knows, says the courts have settled the question," would in fact part with but the half. In this way, we have seen, a probable majority of our courts have dealt with the phrase "deliberately premeditated malice aforethought," when used in the indictment. The words "deliberately premeditated" are not treated by them as surplusage in the statute, but as those distinguishing murder in the first degree from that in the second, and requiring a capital punishment instead of imprisonment. Then they tell us that if in the indictment we divide this whole into halves, and cast aside "deliberately premeditated," the "malice-aforethought" half is equal to the whole. But

Am. D. 321); Bower v. S., 5 Mo. 364, 32 Am. D. 325; S. v. Jones, 20 Mo. 58; Robbins v. S., 8 Ohio St. 131; Fouts v. S., 8 Ohio St. 98; Kain v. S., 8 Ohio St. 306; Hagan v. S., 10 Ohio St. 459; Loeffner v. S., 10 Ohio St. 599, 615; Snyder v. S., 59 Ind. 105. See Hogan v. S., 30 Wis. 428, 11 Am. R. 575; Tenorio v. Territory, 1 New Mex. 279; Stout v. S., 174 Ind. 395, 92 N. E. 161; Daniels v. S., 52 Fla. 18, 41 So. 609; Barker v. Ter., 15 Okla. 22, 78 P. 81; La Rue v. S., 64 Ark. 144, 41 S. W. 53; Cannon v. S., 60 Ark. 564, 31 S. W. 150; S v. Shelton, 64 Iowa, 333, 20 N. W. 450; S. v. Linhoff, 121 Iowa, 632, 97 N. W. 77.

57. See observations in the preface to Vol. I.

it is not in the power of all the creature tribunals in the universe thus to stamp out an eternal principle which the Creator has made and retains; the part of anything will still remain, in spite of the most ponderous words from the bench, less than the whole. Again, the attempt thus to discriminate, and make the part of a thing less than the whole in the statute and equal to the whole in the indictment thereon, is an endeavor to establish as law a contradiction, which judicial tribunals can never do; as well as to overturn the principle pervading the entire universe, that everywhere and in all things without exception, a part is less than the whole. The views of this paragraph are applicable also to some other of the questions considered in this sub-title.

§ 586. **Second Degree.**—It is agreed on all sides that whichever form of the indictment is employed, the defendant may be convicted on it for murder in the second degree.[58]

§ 587. 1. **How, in Future, it should be.**—It results from the foregoing that the decisions we have been criticising have not succeeded in making a new rule of law, which has overturned fundamental axioms of all earthly existence. The axiom, therefore, that a part is less than the whole, or the other one that a contradiction cannot stand, binding as each does all things, consequently binding the courts, sweeps away these erroneous decisions; and every judge, under his duty to administer the law and nothing contrary thereto, is required to decide the old question, not after these new and null utterances, but after the old, the present, and unchangeable law that the part of a thing is less than the whole, and mortals cannot establish contradictions. Even,—

58. Hogan v. S., 30 Wis. 428, 11 Am. R. 575; Morehead v. S., 34 Ohio St. 212; Keefe v. P., 40 N. Y. 348; C. v. Herty, 109 Mass. 348; S. v. Lessing, 16 Minn. 75; Davis v. S., 39 Md. 355; C. v. Gardner, 11 Gray, 438; S. v. Ostrander, 30 Mo. 13; Templeton v. S., 5 Tex. Ap. 398; S. v. Grant, 7 Ore. 414; Giskie v. S., 71 Wis. 612, 38 N. W. 334; Allen v. S., 37 Ark. 433; Smith v. S., 68 Ala. 424. And see Brown v. S., 31 Fla. 207, 12 So. 640.

2. **If this were not so,**—but the question were an ordinary one which judges had the power to decide in a way to bind their successors, we should still be conducted to a like conclusion. An examination of the cases here deemed incorrect discloses that in no one did the court have in mind the unanswerable objections stated in the foregoing sections. Nor did the various judges by whom the opinions were pronounced agree in their reasonings. It is familiar doctrine that a decision from a court overlooking a controlling statute, or any other pivotal thing, is not a rule for the future under the maxim *stare decisis*. Nor is an oversight like that now in contemplation unprecedented. "I recollect," said Bolland, B., sitting in the English court, "that the late recorder (Mr. Knowlys) took an objection to an indictment, the form of which had been used since the reign of Queen Elizabeth. The point was as clear as daylight, but it was a blot that had never been hit before."[59] Nor did the English judges fear to face and *erase* such a blot. Nor does any strong judge anywhere. The feeble only are they who grow pale and turn away. The courts have always deemed that a decent respect for the opinions of mankind, a regard for the feelings and even the prejudices of litigants, and the duty of making known the law for the instruction alike of our own times and the future, demand of them to set down the *reasons* for their decisions. If counsel make an unsound argument, they point out its fallacy; or if a previous case is misinterpreted, they show what the true interpretation is. Is there, then, no judge who, confident of the correctness of the deductions here represented to be false, will enlighten the judicial mind of the country by answering the objections, and so stating the true doctrine that it will be appreciated and followed by all hereafter?[60] It is vain to appeal to the respect enter-

59. Rex v. Austin, 7 Car. & P. 796, 797.

60. In the Texas case of Sharpe v. S., 17 Tex. Ap. 486, decided in 1885, wherein a bench of three judges divided on this question, one of them concurring with the present author, and the other two rendering an opinion which is here deemed unsound, the dissenting judge, Hart, said; "After a very careful reading of all the argu-

tained by every legal person for the learning and integrity of those judges who have delivered former opinions; for there is among us no man who does not know that learning and integrity may overlook a view to which they would have yielded had they seen it, and that to say this implies no lack of respect. Said Blackburn, J., speaking for the court in an English case, and referring to an opinion which the judges had before given: "We should not presume to dissent from that opinion if it were not that we find this point was not argued, and the opinion seems to have been

ments accessible in support of the affirmative of this proposition, I am impelled to the conclusion that the argument of Mr. Bishop upon this question has not been, nor can be, answered." p. 501. The other two judges showed conclusively, by internal evidence appearing in their opinion, that they had not so read as to understand either my expositions or those of any other person on this side of the question. And the same is true of every opinion I ever read, and I think I have read all, delivered on what I regard as the wrong side. I am now making what I suppose will prove to be my final revision of this book. In a long life of law-writing, it has been a duty which I have endeavored to dicharge to point out oversights and mistakes of courts,—limited to such as I saw could properly be and would be corrected by them. How many instances of this sort have occurred, no living man knows or will know. There remain but a few of these pointings-out which have not already been successful in their object. There was never one which did not prevail with every judge who would so read as to understand it. And my books are written, not for a superior race of beings, nor for intellects of a very inferior sort, but for the particular grade of men who enter the legal profession and practice at the bar or preside on the bench. In pursuance of an imperative duty, I pointed out the errors which have occupied us in this chapter. I knew when I wrote, and I know now, that there was never a man on the bench who could not agree with the views presented if he would read them, and read them in a way and with such collateral helps, if any were necessary, as would lead him truly to understand them. There are throughout the country many lawyers who know that I would not consume space in my books with any discussion which would not carry conviction to every mind that truly understood it. I deeply regret the necessity of using so many pages in this chapter; but I have only done what I clearly saw to be my duty. It would be pleasing to me to know that when the anxieties of life are ended with me, the profession for whose benefit I have explained the exertions of a long life would so far appreciate my labors as to give my writings a candid consideration.

hastily adopted *without considering the reasons*, which, we think, would have brought those learned persons to an *opposite opinion*, and which certainly lead us, without any doubt, to hold," etc.[61] Does neither our country now, nor will it in future, contain any judge who will *consider and refute the reasons* which have induced legal persons to dissent from what has been laid down by the majority? A Book not exceeded in wisdom by any in the catalogue of the law points out the evil of a "haughty spirit." And nowhere is condescension more effective for good than on the bench. If, in this case, no real answer is given to the views which have led to the dissent explained in this chapter, and if it continues to be as certain as it has been that none in the majority have even the faintest understanding of what they condemn, judicial harmony on this question must be postponed; for the human mind will not be convinced without *reasons*. The doctrine of *stare decisis*, we have seen, is not applicable here; nor have rights been acquired under the wrong decisions to be impaired by a change.[62]

3. **To save Space**,—some of the elucidations which appeared in the last two editions, yet might be helpful to the reader, are omitted from this.[63]

§ 588. *Murder committed in the Perpetration of other Offenses specified in the Statute*:—

1. **In the foregoing Sections**,—the author, for perspicuity, has refrained from any allusion to another part of these statutes; namely, that making it murder in the first degree to take life in committing or attempting some other felony named, or to take it with extreme atrocity or cruelty.[64]

61. Reg. v. Castro (Law Rep.), 9 Q. B. 350, 363.

62. Ridsdale v. Clifton, 2 P. D. 276, 306, 307; Fairfield v. Gallatin, 9 Cent. L. J. 467, 469, 470 (U. S. Sup. Ct.); New Crim. Law, I, §§ 93-98.

63. In particular, I refer to a long note to this section, and another to § 575, of an earlier edition.

64. New Crim. Law, II, §§ 727, 728; Howell v. C., 26 Grat. 995; Singleton v. S., 1 Tex. Ap. 501; Palmore v. S., 29 Ark. 248; S. v. Garrand, 5 Ore. 216; S. v. Foster, 61 Mo. 549.

2. **The Indictment,**—under this class of the statutes, must somewhat depend on the statutory terms, which vary with the States, and practically it will vary also with the views of the judges on questions already in this chapter considered. The reader has before him the controlling principles, and the author does not propose to enter minutely into the subject. Doubtless, in many cases, an indictment after the common law precedents, drawn by one who had no thought of the statute, would charge a murder within one of these statutory provisions, therefore in the first degree, under any view of the foregoing questions. But should it come short of this, it still seems to be the majority doctrine that the verdict and sentence may be for the first degree.[65] Not uniformly would the minority admit this.[66]

§ 589. **In Principle,**—under the form of doctrine which requires the allegation to be as broad as the verdict, yet maintains that "deliberately premeditated malice aforethought" is charged by the words "malice aforethought," if for the moment we admit such a thing to be possible in principle, an indictment to be good for this sort of murder in the first degree must set out matter to bring the killing within the statutory terms. It has been so intimated judicially.[67]

II. *The Verdict.*

§ 590. **Differences.**—The statutory provision requiring the jury or the court to find, in circumstances pointed out,

65. C. v. Flanagan, 7 Watts & S. 415, 418; Sharpe v. S., 17 Tex. Ap. 486; Penland v. S., 19 Tex. Ap. 365; S. v. Meyers, 99 Mo. 107; Titus v. S., 20 Vroom, 36; P. v. Giblin, 115 N. Y. 196, 21 N. E. 1062. Not necessary to allege felony in committing which murder occurred. Andrews v. P., 33 Colo. 193, 79 Pac. 1031; Oates v. S., 48 Tex. Cr. 131, 86 S. W. 769; S. v. Meyers, 99 Mo. 107, 12 S. W. 516; P. v. Willett, 107 Mo. 251, 1 N. E. 301; S. v. Covington, 117 N. C. 834, 23 S. E. 337; S. v. Foster, 136 Mo. 653, 38 S. W. 731.

66. But see S. v. Meyers, supra; S. v. Johnson, 72 Iowa, 393, 34 N. W. 177.

67. Hill v. P., 1 Colo. 436, 445. And see on various questions, Bechtelheimer v. S., 54 Ind. 128; C. v. Hersey, 2 Allen, 173; Cox v. P., 80 N. Y. 500; Plieming v. S., 46 Wis. 516, 1 N. W. 278; Gustavensen v. S., 10 Wyo. 300, 68 P. 1006.

the degree of the murder, is in differing terms in the several States, and variously construed by the tribunals.[68]

§ 591. **The Proper Form**—for the verdict, in true propriety, is that the defendant is guilty, etc. "in the first degree;" or guilty, etc. "in the second;"[69] or, "not guilty." Concerning such a verdict, no question can arise.[70] But—

§ 592. **When the Finding is simply Guilty,**—not specifying the degree, and the court receives and records this irregular verdict (as it should not do unless persisted in after due explanations[71]), there are diverse opinions as to its effect; thus,—

§ 593. **First or Second as Allegation is.**—If apt words in the indictment charge the first degree, they are by some opinions to be deemed a part of the verdict, and to satisfy the statute; so that sentence may be pronounced for this degree.[72] Or, in the absence of such apt words, the defendant is by some opinions deemed to be convicted in the sec-

68. For something of the statutes, see Sanders v. S., 18 Tex. Ap. 372; Cluverius v. C., 81 Va. 787; Zwicker v. S., 27 Tex. Ap. 539; Parrish v. S., 18 Neb. 405, 25 N. W. 573; S. v. Lindsey, 19 Nev. 47, 3 Am. St. 776, 5 P. 822; Porter v. S., 57 Ark. 267, 21 S. W. 467; Morehead v. S., 34 Ohio St. 212; S. v. Weese, 53 Iowa, 92, 4 N. W. 827; Hall v. S., 31 Fla. 176, 12 So. 449; Lovett v. S., 31 Fla. 164, 12 So. 452; Murphy v. S., 31 Fla. 166, 12 So. 453; P. v. Rugg, 98 N. Y. 537; S. v. Zeller 77 N. J. L. 619, 73 A. 498; S. v. May, 62 W. Va. 129, 57 S. E. 366; P. v. Clark, 155 Mich. 647, 119 N. W. 1094, 15 Det. L. N. 1125 ("guilty as charged" held insufficient.) S. v. Henry, 51 W. Va. 283, 41 S. E. 439; Nelson v. S., 32 Fla. 244, 13 So. 361; Lancaster v. S., 71 Ark. 100, 71 S. W. 251; P. v. O'Neil, 78 Cal. 388, 20 P. 705.

69. Lane v. C., 59 Pa. 371; S. v. Meyers, 99 Mo. 107; Reyes v. S., 49 Fla. 17, 38 So. 257.

70. Rhodes v. C., 48 Pa. 396; Weighorst v. S., 7 Md. 442; C. v. Herty, 109 Mass. 348. "With mercy" may be treated as mere surplusage. S. v. McKay, 150 N. C. 813, 63 S. E. 1059; Daniel v. S., 118 Ga. 16, 43 S. E. 861.

71. Vol. II, §§ 1004, 1012; Adams v. S., 29 Ohio St. 412; Rhodes v. C., 48 Pa. 396; Lane v. C., 59 Pa. 371; Ford v. S., 34 Ark. 649; Green v. S., 55 Miss. 454.

72. C. v. Miller, Lewis Crim. Law, 398; C. v. Earle, 1 Whart. 525; Leschi v. Territory, 1 Wash. Ter. n. s. 13; Cook v. Territory, 3 Wy. 110; S. v. Weese, 53 Iowa, 92; P. v. Rugg, 98 N. Y. 537; Territory v. Romine, 2 New Mex. 114; Territory v. Yarberry, 2 New Mex. 391; S. v. Pepoon, 62 Wash. 635, 114 P. 449; Brown v. Com., 30 Ky. L. 505, 99 S. W. 236; S. v. Hayes, 23 S. D.

ond degree.[73] The proper scope for this distinction is where the words of the indictment are held to mean simply what they purport to, not where the term "malice aforethought" is judicially regarded as charging "deliberately premeditated malice aforethought."

§ 594. **If the Allegation is held thus to mean what it does not say,**—the courts differ as to the verdict upon it. In New York, they then logically hold that a verdict of guilty as charged, on an averment only of "malice aforethought," justifies a sentence for the first degree.[74] In Maine, contrary to logic, yet in accord with reason, this is denied.[75] But—

§ 595. **That the Verdict is Imperfect and Void,**—when silent as to the degree, is the doctrine of the great majority of the authorities, and probably the most in harmony with the reason of the thing; namely, that the legislature intended this provision to be mandatory to make sure of the jury's taking into their special consideration the distinguishing features of the degrees, and passing thereon.[76] Therefore, if the verdict fails to state on its face the degree, the court cannot give judgment on it, but most award a second trial.[77]

596, 122 N. W. 652; guilty "as charged in the indictment" and fixing "his punishment at death" sustained. Siple v. S., 154 Ind. 657, 57 N. E. 544.

73. Johnson v. C., 24 Pa. 386, 389, 390. See also Rhodes v. C., 48 Pa. 396.

74. Kennedy v. P., 39 N. Y. 245, 250.

75. S. v. Cleveland, 58 Me. 564. see S. v. Verrill, 54 Me. 408.

76. Ante, § 569.

77. Colbath v. S., 2 Tex. Ap. 391; Isbell v. S., 31 Tex. 138; Brown v. S., 3 Tex. Ap. 294; Krebs v. S., 3 Tex. Ap. 348; Buster v. S., 42 Tex. 315; Slaughter v. S., 24 Tex. 410; Cockrum v. S., 24 Tex. 394; Wall v. S., 18 Tex. 682, 70 Am. D. 302; Burrell v. S., 16 Tex. 147; White v. S., 16 Tex. 206; Gehrke v. S., 13 Tex. 568; Dick v. S., 3 Ohio St. 89; Parks v. S., 3 Ohio St. 101; Hogan v. S., 30 Wis. 428, 11 Am. R. 575; Hall v. S., 40 Ala. 698; Robertson v. S., 42 Ala. 509; Murphy v. S., 45 Ala. 32; Edgar v. S., 43 Ala. 312; Weatherford v. S., 43 Ala. 319; Cobia v. S., 16 Ala. 781, 783; Johnson v. S., 17 Ala. 618; Noles v. S., 24 Ala. 672; Noles v. S., 26 Ala. 31, 62 Am. D. 711; Harrall v. S., 26 Ala. 52; Ex parte Howard, 30 Ala. 43, 44; S. v. Flani-

§ 596. **The Jury**—have the absolute power to fix the degree;[78] as, if in the opinion of the court which it should state for their guidance,[79] the evidence proves, however conclusively, the first degree, they can still return a verdict for the second. The defendant has no ground of com-

gin, 5 Ala. 477; S. v. Jones, 5 Ala. 666; Trammell v. S., 26 Ark. 534; Neville v. S., 26 Ark. 614; Thompson, v. S., 26 Ark. 323; Allen v. S., 26 Ark. 333; Williams v. S., 6 Neb. 334; S. v. Rover, 10 Nev. 388, 21 Am. R. 745; P. v. Campbell, 40 Cal. 129 (and see In re Brown, 32 Cal. 48; P. v. Noll, 20 Cal. 164); McPherson v. S., 9 Yerg. 279; Kirby v. S., 7 Yerg. 259 (and see Greer v. S., 3 Bax. 321); S. v. Upton, 20 Mo. 397, 400; McGee v. S., 8 Mo. 495; S. v. Ball, 27 Mo. 324; S. v. Phillips, 24 Mo. 475; Thomas v. S., 5 How. Miss. 20, 32; Tully v. P., 6 Mich. 273; S. v. Moran, 7 Iowa, 236; S. v. Johnson, 8 Iowa, 525, 74 Am. D. 321; Zwicker v. S., 27 Tex. Ap. 539; Kendall v. S., 65 Ala. 492; Storey v. S., 71 Ala. 329; Parrish v. S., 18 Neb. 405, 25 N. W. 573; P. v. O'Neil, 78 Cal. 388, 20 P. 705; Kearney v. P., 11 Colo. 258, 17 P. 782; S. v. Montgomery, 98 Mo. 399, 11 S. W. 1012; Dover v. S., 75 Ala. 40; Johnson v. S., 30 Tex. Ap. 419, 28 Am. St. 930; Hall v. S., 31 Fla. 176, 12 So. 449; Lovett v. S., 31 Fla. 164, 12 So. 452; Murphy v. S., 31 Fla. 166, 12 So. 453; S. v. Jackson, 99 Mo. 60, 12 S. W. 367. Under the somewhat different Indiana statute, the conclusions are not entirely the same. Kennedy v. S., 6 Ind. 485; Moon v. S., 3 Ind. 438, 439, dissenting from Wills v. S., 4 Blackf. 457. For some related question, see Porter v. S., 57 Ark. 267; Doran v. S., 7 Tex. Ap. 385; Jordan v. S., 81 Ala. 20; Ford v. S., 34 Ark. 649; S. v. Anderson, 89 Mo. 312, 1 S. W. 135; Price v. C., 33 Grat. 819, 36 Am. R. 797; Kannon v. S., 10 Lea, 386; P. v. Clark 119 N. W. 1094, 155 Mich. 647, 15 Det. Leg. N. 1125; Hembree v. S., 68 Ark. 621, 58 S. W. 350; Lancaster v. S., 71 Ark. 100, 71 S. W. 251; Mahany v. P., 31 Colo. 365, 73 P. 26; Reyes v. S., 49 Fla. 17, 38 So. 257; S. v. O'Shea, 59 Kan. 593, 53 P. 876; S. v. Heth, 60 Kan. 560, 57 P. 108; Russell v. S., 66 Neb. 497, 92 N. W. 751; S. v. Truesdell, 125 N. C. 596, 34 S. E. 646; S. v. Jefferson, 125 N. C. 712, 34 S. E. 648; S. v. Hubbard, 20 S. D. 148, 104 N. W. 1120; Waddell v. S., 112 Tenn. 556, 82 S. W. 827; Lyles v. S., 48 Tex. Cr. 119, 86 S. W. 763; McCloud v. S., 37 Tex. Cr. 237, 39 S. W. 104; S. v. Hager, 50 W. Va. 370, 40 S. E. 393.

78. S. v. Carr, 53 Vt. 37; Westcott v. S., 31 Fla. 458, 12 So. 846; S. v. Turpin, 10 Cal. Ap. 526, 102 P. 680; Tillman v. S., 136 Ga. 59, 70 S. E. 876; S. v. Heath, 221 Mo. 565, 12 S. W. 149. So in assault with intent to kill, Horton v. P., 47 Colo. 252, 107 Pac. 257; McAlister v. S., 7 Ga. Ap. 541, 67 S. E. 221. Compare as to instructions on the degree, Koser v. P., 224 Ill. 201, 79 N. E. 201; S. v. Miller (Mo. 1906), 98 S. W. 25.

79. S. v. Hanley, 34 Minn. 430, 26 N. W. 397; S. v. Thomas (La. 1897), 23 So. 250.

plaint.[80] Of course, the proofs must establish murder, of one sort or the other.[81]

80 S. v. Lindsey, 19 Nev. 47, 3 Am. St. 776. See Fagg v. S., 50 Ark. 506, 8 S. W. 829; Bennett v. S., 95 Ark. 100, 128 S. W. 851; S. v. Bobbitt, 215 Mo. 10, 114 S. W. 511; P. v. Cyty, 11 Cal. Ap. 702, 106 P. 257; S. v. Sebastian, 215 Mo. 58, 114 S. W. 522; S. v. Perry, 78 S. C. 184, 59 S. E. 851; S. v. Owens, 79 S. C. 125, 60 S. E. 305; Serna v. S. (Tex. 1907), 105 S. W. 795; Castlin v. S. (Tex. 1900), 57 S. W. 827; S. v. Underwood, 35 Wash. 558, 77 P. 863.

81. Turner v. S., 20 Tex. Ap. 56.

CHAPTER CXXIX.

HOMICIDE, AS TO THE EVIDENCE.

Consult—the places cited introducing the first chapter on HOMICIDE; namely, c. 31.

§ 597. **The Whole Subject of Criminal Evidence**—is treated of in a series of chapters in the first volume.[82] Still, both in that volume and this, we consider incidentally special questions of evidence in connection each with its particular topic. In felonious homicide, considerable numbers of such questions present themselves.

§ 598. 1. **The Authorities,**—within the scope of this chapter, are multitudinous, and contradictory to a degree somewhat disturbing. They have immensely accumulated since the last edition was published; so that it is neither possible nor desirable to cite absolutely all.

2. **How Chapter divided.**—We shall consider, I. The Presumptions and Burden of Proof; II. The Character, Conduct, and Utterances of the Deceased; III. The Same of the Defendant, and his Relations with the Deceased; IV. Expert Testimony; V. Other Questions of Evidence.

I. *The Presumptions and Burden of Proof.*[83]

§ 599. 1. **Burden Shifting.**—The old books, largely followed in the modern cases, seem to maintain that when

82. Vol. II, §§ 1045a-1262, and incidently in other places.

83. Compare with Vol. II, §§ 1048-1051, 1096-1101, 1102 et seq. And see New Crim. Law, II, §§ 673 673b.

prima facie proof of an alleged homicide has been adduced, if the defendant relies on a justification,—as, that what he did was in self-defence,[84] or under a provocation reducing the guilt to manslaughter,[85]—the burden of proof shifts from the State to him.[86] Or, if he asserts that the death proceeded, not from a proven wound in itself adequate, but from malpractice in its treatment, he has the burden to show this.[87]

2. **A Preponderance of Evidence,**—as in civil cases, will sustain such defense; it need not be proved beyond a reasonable doubt.[88] Still,—

3. **By the Better Doctrine,**—the burden of proof never shifts from the State to the defendant; the former must make out its case throughout. And so, at least, are many

84. Silvus v. S., 22 Ohio St. 90; P. v. Stonecifer, 6 Cal. 405; P. v. Schryver, 42 N. Y. 1, 1 Am. R. 480; Weaver v. S., 24 Ohio St. 584; S. v. Jones, 20 W. Va. 764; Gibson v. S., 89 Ala. 121, 18 Am. St. 96; S. v. Hill, 69 Mo. 451; S. v. Jones, 78 Mo. 278; P. v. Hong Ah Duck, 61 Cal. 387; Stitt v. S., 91 Ala. 10, 24 Am. St. 853, 8 So. 98. See post, § 606 note; James v. S., 167 Ala. 14, 52 So. 840; S. v. Pepe (Del. 1910), 76 A. 367; S. v. Borrelli (Del. 1910), 76 A. 605; S. v. Wiggins, 7 Pen. (Del.) 127, 76 A. 632; S. v. Reese (Del. 1911), 79 A. 217; S. v. Crean, 43 Mont. 47, 114 P. 603; S. v. Simonds, 154 N. C. 197, 69 S. E. 790; S. v. Quick, 150 N. C. 820, 64 S. E. 168; S. v. Chastain, 85 S. C. 64, 67 S. E. 6; S. v. Hibler, 79 S. C. 170, 60 S. E. 438; S. v. Ware, 58 Wash. 526, 109 P. 359; Foster v. Ter., 6 Ariz. 240, 56 P. 738; Brown v. S., 62 N. J. L. 666, 42 A. 811; S. v. Dillard, 59 W. Va. 197, 53 S. E. 117.

85. S. v. Smith, 77 N. C. 488.

86. C. v. Webster, 5 Cush. 295, 305, 52 Am. D. 711; U. S. v. Knowles, 4 Saw. 517; S. v. Haywood, Phillips, N. C. 376; S. v. Willis, 63 N. C. 26; Cook v. Territory, 3 Wyo. 110, 4 P. 887; Territory v. McAndrews, 3 Mont. 158; P. v. Raten, 63 Cal. 421; S. v. Jones, 98 N. C. 651, 3 S. E. 507; Hogan v. S., 61 Ga. 43; P. v. Langston, 67 Cal. 427, 7 P. 843; Cleveland v. S., 86 Ala. 1, 5 So. 426; Vann v. S., 83 Ga. 44, 9 S. E. 945; S. v. Roberts Del. 1910), 78 A. 305; S. v. Yates (N. C.), 71 S. E. 317; Com. v. Colandro, 231 Pa. 343, 80 A. 571. Contra, S. v. McPherson, 114 Minn. 498, 131 N. W. 645.

87. S. v. Briscoe, 30 La. Ann. 433.

88. Vol. II, § 1095; Silvus v. S., supra; P. v. Schryver, supra; P. v. Stonecifer, supra; Weaver v. S., supra; P. v. Hong Ah Duck, supra; S. v. Jones, 20 W. Va. 764; S. v. Whitson, 111 N. C. 695, 16 S. E. 332; S. v. Skinner, 32 Nev. 70, 104 P. 223.

and it is believed most of the modern decisions; yet the jury should give effect to the various presumptions of fact, the same as to the testimony of witness, and convict when, and only when, satisfied, on due consideration of the whole, that beyond a reasonable doubt the defendant is guilty.[89]

§ 600. **State's Witnesses or Prinsoner's.**—There are cases seeming to hold that the burden shifts or not, according as the evidence for the defendant comes from his witnesses or the State's.[90] Perhaps this is not mean; certainly there is no ground for this distinction.

§ 601. **Where the Death is from a Deadly Weapon,**—the law ordinarily holds the killing to be murder as distinguished from manslaughter.[91] And it is but another form of the proposition to say that in matter of evidence, a homicide thus committed is, in the absence of extenuating

89. Vol. II, §§ 1048-1051; post, § 606, note; S. v. Porter, 34 Iowa, 131; Ake v. S., 6 Tex. Ap. 398, 32 Am. R. 586; S. v. Morphy, 33 Iowa, 270, 11 Am. R. 122; S. v. Bartlett, 43 N. H. 224, 232, 80 Am. D. 154; S. v. Hodges, 50 N. H. 510, 526; S. v. Mitchell, 64 Mo. 191; S. v. Lane, 64 Mo. 319; Perry v. S., 44 Tex. 473; Murray v. S., 1 Tex. Ap. 417; Elland v. S., 52 Ala. 322; P. v. West, 49 Cal. 610; S. v. Alexander, 66 Mo. 148; P. v. Elliott, 80 Cal. 296, 22 P. 207; S. v. Donahoe, 78 Iowa, 486, 43 N. W. 297; P. v. Downs, 123 N. Y. 558, 25 N. E. 988; Richardson v. S., 9 Tex. Ap. 612; S. v. Deschamps, 42 La. Ann. 567, 21 Am. St. 392, 7 So. 703; S. v. Hickam, 95 Mo. 322, 6 Am. St. 54, 8 S. W. 252; S. v. Blackburn, 7 Pen. (Del.) 479, 75 A. 536; S. v. Ardoin, 128 La. 14, 54 So. 407; Johnson v. S., 5 Okla. Cr. Ap. 13, 113 P. 552; Com. v. Vanchaski, 42 Pa. Sup. Ct. 294; Lawson v. S., 171 Ind. 431, 84 N. E. 974; S. v. Partipilo, 139 Iowa, 474, 116 N. W. 1049. See as to accidental character of the homicide, S. v. Hazlett, 16 N. D. 426, 113 N. W. 374; S. v. Pressler, 16 Wyo. 214, 92 P. 806.

90. Dixon v. S., 13 Fla. 636; Gladden v. S., 13 Fla. 623; McDaniel v. S., 8 Sm. & M. 401, 417, 47 Am. D. 93; Alexander v. P., 96 Ill. 96. And see P. v. West, 49 Cal. 610; S. v. McCluer, 5 Nev. 132; Tweedy v. S., 5 Iowa, 433; S. v. Byrd, 41 Mont. 585, 111 P. 407; S. v. Quick, 150 N. C. 820, 64 S. E. 168. The accused in proving that he acted in self defense, is entitled to have the benefit of any facts tending to prove self defence which are brought out by the state, and also to an instruction that the jury are to consider such facts. S. v. Manns, 48 W. Va., 480, 37 S. E. 613; S. v. Dellard 59 W. Va. 197, 53 S. E. 117.

91. New Crim. Law, II, §§ 680, 681; S. v. Fowler, 151 N. C. 731, 66 S. E. 567.

circumstances, presumed to be murder.[92] How far this presumption is of law and conclusive, and how far of fact and within the control of the jury, we have in a measure considered elsewhere.[93] Properly viewed, the question is a mixed one of law and fact, upon which, of necessity, the jury are to pass.[94] It would be inaccurate to tell them that they are legally compelled to find murder.[95] And on this question, they are to take into the account the circumstances special to the case.[96] The killing may, for example, be man-

92. S. v. Gillick, 7 Iowa, 287; S. v. Merrill, 2 Dev. 269; U. S. v. Mingo, 2 Curt. C. C. 1; Kilpatrick v. C., 31 Pa. 198; U. S. v. Wiltberger, 3 Wash. C. C. 515; Hill v. C., 2 Grat. 594; Bivens v. S.. 6 Eng. 455; Mask v. S., 36 Miss. 77; S. v. Ward, 5 Harring. Del. 496; S. v. Willis, 63 N. C. 26; S. v. Evans, 65 Mo. 574; Hadley v. S., 55 Ala. 31; Murphy v. S., 37 Ala. 142; S. v. Alexander, 66 Mo. 148; Murphy v. S., 31 Ind. 511; S. v. Shippey, 10 Minn. 223, 88 Am. D. 70; S. v. Musick, 101 Mo. 260, 14 S. W. 212; Hawthorne v. S., 58 Miss. 778; Gibson v. S., 89 Ala. 121, 18 Am. St. 96, 8 So. 98; Vann v. S., 33 Ga. 44; S. v. Deschamps, 42 La. Ann. 567, 21 Am. St. 392, 7 So. 703; Cochran v. S., 28 Tex. Ap. 422, 13 S. W. 651; Brown v. S., 83 Ala. 33, 3 Am. St. 685, 3 So. 857; S. v. Byers, 100 N. C. 512, 6 S. E. 420; S. v. Levelle, 34 S. C. 120, 27 Am. St. 799, 13 S. E. 319; S. v. Jackson, 36 S. C. 487, 31 Am. St. 890, 15 S. E. 559; Clardy v. S., 96 Ark. 52, 131 S. W. 46; Young v. S. (Ark. 1911), 138 S. W. 475; P. v. Matthai, 135 Cal. 442, 67 P. 694; S. v. Miele (Del. O. & T. 1909), 74 A. 8; S. v. Moore (Del. Gen. Sess. 1910), 74 A. 1112; S. v. Pepe (Del. Gen. Sess. 1910), 76 A. 367; S. v. Primrose (Del. O. & T.), 77 A. 717; S. v. Russo (Del. O. & T.), 77 A. 743; S. v. Roberts (Del. 1910), 78 A. 305; S. v. Reese (Del. O. & T. 1911), 79 A. 217; Odom v. S., 51 Fla. 91, 40 So. 182; Flannigan v. S., 135 Ga. 221, 69 S. E. 171; Rigsby v. S., 174 Ind. 284, 91 N. E. 925; Thomas v. Com., 27 Ky. L. 794, 86 S. W. 694; P. v. Collins, 131 N. W. 78, 18 Det. Leg. N. 274; S. v. Towers, 106 Minn. 105, 118 N. W. 361; S. v. Worley, 141 N. C. 764, 53 S. E. 128; S. v. McKay, 150 N. C. 837, 63 S. E. 1059; Com. v. Palmer, 222 Pa. 299, 71 A. 100; Williams v. S., 56 Tex. Cr. Ap. 496, 123 S. W. 1110; S. v. Abbott, 64 W. Va. 411, 62 S. E. 693.

93. New Crim. Law, II, §§ 673-673b, 679-681.

94. S. v. Zibart, 40 Iowa, 169; Eiland v. S., 52 Ala. 322; S. v. Gilman, 69 Me. 163, 31 Am. R. 257; S. v. Bohanan, 76 Mo. 562.

95. Clem v. S., 31 Ind. 480; Kingen v. S., 45 Ind. 518; Smith v. C., 1 Duv. 224; Field v. S., 50 Ind. 15; S. v. Silverio (N. J. 1910), 76 A. 1069.

96. S. v. Harrison, 5 Jones (N C.) 115; Rex v. Freeman, 1 Russ. Crimes (5th Eng. Ed.) 681.

slaughter.[97]

§ 602. **As to the Degree of Murder,**—if the deadly weapon is used in a way to take life, the non-conclusive presumption is that the party meant this result;[98] so that the first degree of the offense is, under most of our statutes, shown.[99] But a mere killing with such weapon, with nothing more, is not murder in the first degree.[1] And where the statute requires a more distinct premeditation, or more intense malice, the verdict can be only for the second degree.[2] But it should be borne in mind that the circumstances and statutes differ, and the jury is to pass on the question.[3]

§ 603. **Presumption from mere Killing.**—In numerous cases it is laid down that a bare taking of life, unattended by any explanatory circumstance,—no deadly weapon, nothing in aid of an inference appearing,—the law presumes it murder;[4] or, if by statute there are two degrees

97. S. v. Smith, 77 N. C. 488; S. v. Blackburn (Del. O. & T. 1892), 75 A. 536; Arnett v. Com., 137 Ky. 270, 125 S. W. 700.

98. Thomas v. P., 67 N. Y. 218, 225; Kilpatrick v. C., 31 Pa. 198, 216; Moon v. S., 68 Ga. 687; S. v. Ah Lee, 8 Ore. 214; S. v. Maioni, 78 N. J. L. 339, 74 A. 526.

99. New Crim. Law, II, § 728; Handley v. S., 96 Ala. 48, 38 Am. St. 81, 11 So. 322; S. v. Doyle, 107 Mo. 36, 17 S. W. 751; S. v. Wiggins, 7 Pen. (Del.) 127, 76 A. 632; S. v. Borrelli (Del. O. & T. 1910), 76 A. 605.

1. Burris v. S., 38 Ark. 221; Patterson v. S., 85 Ga. 131, 21 Am. St. 152, 11 S. E. 620; S. v. McKinzie, 102 Mo. 620, 15 S. W. 149; S. v. Stackhouse, 152 N. C. 808, 67 S. E. 764.

2. S. v. Testerman, 68 Mo. 408; S. v. Mitchell, 64 Mo. 191; S. v. Talmage, 107 Mo. 543, 17 S. W. 990; S. v. Landgraf, 95 Mo. 97, 6 Am. St 26, 8 S. W. 237. And see the next section; Perry v. S., 44 Tex. 473; Murray v. S., 1 Tex. Ap. 417; S. v. Lane, 64 Mo. 319; S. v. Cox, 153 N. C. 638, 69 S. E. 419; Com. v. Chapler, 228 Pa. 630, 77 A. 1013; S. v. Abbott, 64 W. Va. 411, 62 S. E. 693.

3. See also S. v. Norwood, 115 N. C. 789, 20 S. E. 712; Chrisman v. S., 54 Ark. 283, 26 Am. St. 44, 15 S. W. 889; P. v. Carlton, 115 N. Y. 618, 22 N. E. 257; S. v. Dickson, 78 Mo. 438; Territory v. Romine, 2 New Mex. 114; Hendrickson v. C., 85 Ky. 281, 7 Am. St. 596, 3 S. W. 166; Farris v. C., 14 Bush, 362; Wood v. S., 27 Tex. Ap. 393; Adams v. S., 28 Fla. 511, 10 So. 106; Hicks v. S., 25 Fla. 535.

4. Witt v. S., 6 Coldw. 5; Milton v. S., 6 Neb. 136; S. v. Brown, 12 Minn. 538; Dietz v. Langfitt, 63 Pa. 234; Clarke v. S., 35 Ga. 75; Clem-

of murder, that it was in the second degree, not the first.[5] But—

§ 604. 1. **This Doctrine is not Practical,**—because the facts of cases never disclose a mere taking of the life and no more. No killing can be proved without something appearing as to the cause, the means, or the manner of it. Then, if this something does appear, this doctrine is not

ents v. S., 50 Ala. 117; Davis v. S., 25 Ohio St. 369; Reg. v. Maloney, 9 Cox, C. C. 6; Brown v. S., 4 Tex. Ap. 275; S. v. Smith, 77 N. C. 488; Draper v. S., 4 Bax. 246; Gray v. S., 4 Bax. 331; P. v. March, 6 Cal. 543; S. v. Knight, 43 Me. 11, 137; S. v. Town, Wright, 75; Pennsylvania v. Lewis, Addison, 279, 282; Pennsylvania v. McFall, Addison, 255; U. S. v. Armstrong, 2 Curt. C. C. 446; S. v. Johnson, 3 Jones (N. C.) 266; Green v. S., 28 Miss. 687; C. v. York, 9 Met. 93; Mitchell v. S., 5 Yerg. 340; S. v. Anderson, 2 Tenn. 6, 5 Am. D. 648; Hague v. S., 34 Miss. 616; Rex v. Greenacre, 8 Car. & P. 35; Murphy v. P., 37 Ill. 447; S. v. Alexander, 30 S. C. 74, 14 Am. St. 879; Wilson v. S., 69 Ga. 224; Tiffany v. C., 121 Pa. 165, 6 Am. St. 775, 15 A. 462; Grant v. S., 62 Ala. 233; P. v. Knapp, 71 Cal. 1, 11 P. 793; Newton v. S., 21 Fla. 53; Brown v. S., 4 Tex. Ap. 275; P. v. Callaghan, 4 Utah, 49, 6 P. 49; S. v. Blackburn, 7 Pen. (Del.) 479, 75 A. 536; Leonard v. S., 133 Ga. 435, 66 S. E. 251; Hawkins v. U. S., 3 Okla. Cr. Ap. 651, 108 P. 561; Robinson v. S., 129 Ga. 336, 58 S. E. 842.

5. Witt v. S., supra; Mitchell v. S., supra; McCue v. C., 78 Pa. 185, 21 Am. R. 7; S. v. McCormick, 27 Iowa, 402; Hall v. S., 40 Ala. 698; S. v. Underwood, 57 Mo. 40; Stokes v. P., 53 N. Y. 164, 13 Am. R. 492; Preuit v. P., 5 Neb. 377; Dukes v. S., 14 Fla. 499; S. v. Gassert, 65 Mo. 352; Richarte v. S., 5 Tex. Ap. 359; Farrer v. S., 42 Tex. 265; Hamby v. S., 36 Tex. 523; S. v. Holme, 54 Mo. 153; Hill v. C., 2 Grat. 594, 598; S. v. Turner, Wright, 20; Witt v. S., 6 Coldw. 5; S. v. Tabor, 95 Mo. 585, 8 S. W. 744; Willis v. C., 32 Grat. 929; Douglass v. S., 8 Tex. Ap. 520. And see Cathcart v. C., 37 Pa. 108. Or, the presumption may be simply that the killing was murder, the jury to infer the degree from the facts proved. P. v. Gibson, 17 Cal. 283; P. v. Belencia, 21 Cal. 544; Ferguson v. S., 92 Ark. 120, 122 S. W. 236; S. v. Blackburn, 7 Pen. (Del.) 479, 75 A. 536; Davis v. S., 51 Neb. 301, 70 N. W. 984; S. v. Silverio, 79 N. J. L. 482, 76 A. 1069; S. v. Leo, 80 N. J. L. 21, 77 A. 523; Com. v. Greene, 227 Pa. 86, 75 A. 1024; Barnes v. S. (Tex. Cr. Ap. 1909), 125 S. W. 39; S. v. Abbott, 64 W. Va. 411, 62 S. E. 693; S. v. Roberson, 150 N. C. 837, 64 S. E. 182; Litton v. Com., 101 Va. 833, 44 S. E. 923; Langley v. Com., 99 Va. 907, 37 S. E. 339; S. v. Hobbs, 37 W. Va. 812, 17 S. E. 380; Perkins v. S., 124 Ga. 6, 52 S. E. 17; S. v. Baurle, 145 Mo. 1, 46 S. W. 609; S. v. McMullin, 170 Mo. 608, 71 S. W. 221.

applicable to the case.[6] It is a mere abstraction. And, as we have seen, a judge has no right to give in charge to the jury anything, however correct, not relevant to the evidence under consideration. That it has often been done in this class of cases does not alter the question; for, in practice, many things are done without objection, which would not be suffered were objection made. Therefore, assuming this doctrine to be abstractly right, no judge is authorized to give it in charge to the jury, unless by consent. Again,—

2. **It is not True.**—It is said to grow out of the proposition that "as men seldom do unlawful acts with innocent intentions, the law presumes every act in itself unlawful to have been criminally intended, until the contrary appears."[8] Here the unlawfulness of the killing is assumed, contrary to the general fact. Though there are unlawful killings, there are incomparably more lawful ones. Indeed, the common course of taking life among us is lawful; for instance, it is so when the regularly educated and licensed physician unintentionally kills his patient, and there are many more deaths of this sort than murders. It is so when one takes life in self-defense; in preventing the commission of a felony; in battle; in the infliction of the death-penalty adjudged by the law; and in numerous other circumstances. Since, therefore, in most instances in which the life is taken, it is lawfully done, we violate one of the familiar principles in the law of evidence,[9] when, contrary to the common course of things, we presume it to be unlawful. Or, if we do presume it unlawful, whence the further presumption that it is felonious? Or, if we presume it felonious, why not stop with manslaughter—why add to the presumption the malice aforethought of murder? Or, lastly, if we presume it murder, why stop with the second degree—

6. C. v. Hawkins, 3 Gray, 463; C. v. York, 9 Me. 93; S. v. Patterson, 45 Vt. 308, 12 Am. R. 200; Hampton v. S., 45 Ala. 82.

7. Vol. II, § 978; Hampton v. S., supra.

8. 1 Greenl. Ev., § 34; 1 Taylor, Ev., § 103.

9. 1 Greenl. Ev., §§ 34, 40-42, 370; 1 Bishop Mar. Div. & S., §§ 927, 931, 935, 945. And see Vol. II, §§ 1103, 1106.

why not presume that the murder was in the first degree? And—

3. **The better considered Modern Cases**—reject this presumption as a practical rule;[10] though, of course, if the attending circumstances appear, the greater or less unlawfulness of the killing is presumed or proved.[11] Moreover,—

§ 605. **In Conflict with other Presomptions**—is this one; as, with that of innocence, whereby an act which can be attributed equally to either of two causes, the one rendering it lawful and the other unlawful, is by the law referred to the former.[12] Since, in some circumstances, the taking of life is lawful, and in others not, the presumption from the mere taking should always be that it was under the former circumstances, not the latter. Again, such presumption and the doctrine of reasonable doubt[13] cannot exist together; for, when a mere unexplained killing is shown, with no indication of its circumstances, manner, or occasion, it is impossible any jury of sane men should be thereby convinced it was murder, *beyond a reasonable doubt.* Even if the killing were assumed to be unlawful, and the unlawfulness were assumed to amount to crime, to take the further step and presume it murder would violate the rule that each aggravation of an offense must be so affirmatively proved as to satisfy the jury of it beyond a reasonable doubt.[14] Once more,—

10. Gardner v. P., 106 Ill. 76, 84; S. v. Trivas, 32 La. Ann. 1086, 36 Am. R. 293; Kent v. P., 8 Colo. 563; S. v. Swayze, 30 La. Ann. 1323; S. v. Deschamps, 42 La. Ann. 567, 21 Am. St. 392, 7 So. 703; Robinson v. S., 16 Tex. Ap. 347; Fallin v. S., 83 Ala. 5, 3 So. 525.

11. McClain v. C., 110 Pa. 263; U. S. v. Boyd, 45 Fed. Rep. 851; S. v. Levelle, 34 S. C. 120, 27 Am. St. 799, 13 S. E. 319; Fallin v. S., 83 Ala. 5, 3 So. 525. See Tiffany v. C., 121 Pa. 165, 6 Am. St. 775, 15 A. 462; S. v. Brown, 41 Minn. 319, 43 N. W. 69; Vann v. S., 83 Ga. 44, 9 S. E. 945; Bryant v. S., 7 Bax. 67. Homicide resulting from robbery dispenses with proof of a wilful and premeditated design to take life. Com. v. Aston, 227 Pa. St. 106, 75 A. 1017.

12. 1 Bishop Mar. Div. & S., §§ 1026–1031.

13. Vol. II, §§ 1091-1095.

14. Vol. II, § 1095; Warren v. C., 37 Pa. 45.

§ 606. Attending Facts.—Though it is admitted that this presumption is not applicable where any fact besides the mere taking of life appears,[15] yet, as no other case exists, it is always in practice applied where its irrelevancy is conceded. Indeed, the common statement of the presumption exhibits it mingling with explanatory evidence; as, said Sir Michael Foster: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, *unless* they arise out of the evidence produced against him;[16] for the law presumeth the fact to have been founded in malice, until the contrary appeareth."[17] Now, if the explanatory fact is that the killing was with a deadly weapon, a presumption already stated applies;[18] and though it leads to the same result as this one, it is different, and necessarily supersedes it. Or if such fact is that the death was caused by excessive chastisement, yet with a rod not deadly, this raises the presumption of manslaughter,[19] and necessarily supersedes the presumption under consideration. And if we should consider thus every possible form of explanatory matter, we should find that each had its presumption, superseding the one now in question. So that, in conclusion, and to sum all up, this presumption is wrong in principle, it is directly contrary to other and well-established presumptions which annihilate it, and if it were true there is no possible case to which it can be applied.[20]

15. Ante, § 603.

16. See ante, §§ 599, 600.

17. Foster, 255; Williams v. S., 6 Neb. 334; Clarke v. S., 35 Ga. 75; S. v. Smith, 77 N. C. 488; C. v. Webster, 5 Cush. 295, 52 Am. D. 711; S. v. Moore (Del. Gen. Sess. 1910), 74 A. 1112.

18. Ante, §§ 601, 602.

19. New Crim. Law, II, § 690 (1, 2).

20. I cannot better illustrate in what cases this question has unnecessarily and improperly arisen than by the famous one of C. v. York, 9 Met. 93, in which a very able bench of judges disagreed. York had killed his victim with a very deadly weapon, a dirk knife, plunged to the heart. It was contended for him that the killing was either in self-defense or in a heat of passion, reducing it to manslaughter. So there was no scope for a presumption applicable where only a mere causing of death ap-

§ 607. Continuing Malice.—In a case proper for pre-

pears. The trial court instructed the jury that "when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law is that it is malicious, and an act of murder." P. 94. But here, it is seen, more was shown, yet the tribunal of review, by a majority, held the instruction correct. Said Shaw, C. J.: "The case to which the rule we are now considering applies, is one where the life of the deceased has been taken by the accused by a voluntary act, a wound inflicted with great violence, with a deadly weapon, and upon a vital part." P. 102. But the reader sees that the rule is for a case quite outside such facts. That the doctrine actually adjudged was as above stated, further appears from the subsequent case of C. v. Hawkins, 3 Gray, 463. The dissenting opinion in York's Case, by Wilde, J., presents the following conclusions. "1. That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter is to be decided upon the evidence, and not upon any presumption from the mere act of killing. 2. That if there be any such presumption, it is a presumption of fact; and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner. 3. That the burden of proof, in every criminal case, is on the commonwealth to prove all the material allegations in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him." P. 133. And see Goodall v. S., 1 Or. 333, 80 Am. D. 396; McDaniel v. S., 8 Sm. & M. 401, 47 Am. D. 93; S. v. Hodge, 50 N. H. 510, 526; U. S. v. Armstrong, 2 Curt. C. C. 446; S. v. Patterson, 45 Vt. 308, 12 Am. R. 200; Tweedy v. S., 5 Iowa, 433; S. v. McCluer, 5 Nev. 132; P. v. West, 49 Cal. 610; P. v. Wolf, 95 Mich. 625, 55 N. W. 357. In a Michigan case, Christiancy, J. well observed: "To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense, or aforethought. This malice is just as essential an ingredient of the offense as the act which causes the death; without the concurrence of both, the crime cannot exist; and, as every man is presumed innocent of the offense of which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offense—to the malice as well as to the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof, as to each, rests equally upon the prosecution, though the one may admit and require more direct proof than the other; malice, in most cases, not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition

sumptions,[21] if the malice of murder is shown of a date prior to the homicide, its existence at the time of it may be presumed unless the contrary appears.[22] Intervening facts may strengthen, weaken, or remove this presumption;[23] or the defendant may show that the killing proceeded from a sudden provocation, not from the prior malice.[24]

§ 608. **Other Presumptions**—there are;[25] but they are in general such as are explained in our treatment of the law of the offense in "New Criminal Law," or are common to all departments of the law of evidence. Or they may be within the expositions of the first volume.[26]

II. *The Character, Conduct, and Utterances of the Deceased.*

§ 609. *In General:*—

Except under Special Facts,—developed in the particular case, proof of the character, conduct, or utterances of the deceased is not admissible in trials for homicide.[27] For nothing of this sort will ordinarily even extenuate a killing. But the exceptional circumstances now to be explained may require a departure from the rule. Thus,—

or state of mind with which it was done." Maher v. P., 10 Mich. 212, 218, 81 Am. D. 781.

21. See U. S. v. Armstrong, 2 Curt. C. C. 446; Bird v. S., 14 Ga. 43; P. v. Bodine, 1 Denio, 281.

22. S. v. Johnson, 1 Ire. 354, 35 Am. D. 742; S. v. Hildreth, 9 Ire. 429, 51 Am. D. 364; Weed v. P., 3 Thomp. & C. 50; Faire v. S., 58 Ala. 74. See S. v. Tilly, 3 Ire. 424; Long v. S., 52 Miss. 23.

23. McCoy v. S., 25 Tex. 33, 78 Am. D. 520.

24. S. v. Johns, 2 Jones (N. C.) 247, 64 Am. D. 582; S. v. Barnwell, 80 N. C. 466.

25. Blackburn v. S., 23 Ohio St. 146; C. v. Harman, 4 Pa. 269; Watt v. P., 126 Ill. 9, 18 N. E. 340; Williams v. S., 64 Md. 384, 1 A. 887; Johnson v. S., 17 Ala. 618; Tiffany v. C., 121 Pa. 165, 6 Am. St. 775, 15 A. 462; S. v. Ching Ling, 16 Or. 419, 18 P. 844; Davidson v. S., 135 Ind. 254, 34 N. E. 972.

26. Vol. II, §§ 1096-1131.

27. S. v. Hogue, 6 Jones (N. C.) 381; Newcomb v. S., 37 Miss. 383; S. v. Barfield, 8 Ire. 344; Queenberry v. S., 3 Stew. & P. 308; C. v. Ferrigan, 44 Pa. 386; Chase v. S., 46 Miss. 683, 703; Wait v. P., 46 Colo. 136, 104 P. 89; Pride v. S., 133 Ga. 438, 66 S. E. 259; Pressley v. S., 132 Ga. 164, 63 S. E. 784; Birdwell v. U. S., 4 Okla. Cr. Ap. 472, 113 P. 205; S. v. Raice, 24 S. D. 111, 123 N. W. 708.

§ 610. **Under a Claim of Self-defense,**—where the necessity of the defendant's resorting to it should be judged of by the facts as they *appeared to him*, whatever they truly were,[28] he may give in evidence whatever he knew of the character, prior conduct, threats, or other utterances of the person with whom he was contending, which, not as showing that the man was bad, but that in the special instance and circumstances he was dangerous, might reasonably have place among the considerations guiding his actions.[29] On the other hand,—

§ 611. **What was Unknown**—to the defendant cannot thus be shown; because it is impossible he should have acted upon it.[30] We have seen that one may rely upon what he did not know[31] when its effect is to prove the absence of any wrong or injury; because then the criminal act did not concur with the criminal intent, both of which are essential in crime.[32] But here, where the act, namely, the homicide, has been committed,[33] and the further inquiry relates simply to the mental condition prompting it, only what the doer knew is relevant; for that alone could have

28. New Crim. Law, I, §§ 303, 305, 874; II, §§ 653, 654; Childers v. S., 30 Tex. Ap. 160, 28 Am. St. 899.

29. S. v. Turpin, 77 N. C. 473; S. v. Bryant, 55 Mo. 75; S. v. Keene, 50 Mo. 357; S. v. Dodson, 4 Ore. 64; Eiland v. S., 52 Ala. 322; Horbach v. S., 43 Tex. 242; P. v. Lombard, 17 Cal. 316; Palmore v. S., 29 Ark. 248; P. v. Williams, 17 Cal. 142; S. v. Robertson, 30 La. Ann. 340; S. v. Matthews, 78 N. C. 523; Long v. S., 52 Miss. 23; Holloway v. C., 11 Bush. 344; Howell v. S., 5 Ga. 48; U. S. v. Rice, 1 Hughes, 560; Powell v. S., 52 Ala. 1; P. v. Anderson, 39 Cal. 703; Noles v. S., 26 Ala. 31, 62 Am. D. 711; Com. v. Bright, 23 Ky. L. 192, 66 S. W. 604; S. v. Kimbrell, 151 N. C. 702, 66 S. E. 208; Darnell v. State, 50 Tex. Cr. Ap. 585, 126 S. W. 1122; S. v. Barksdale, 122 La. 788, 48 So. 264; S. v. Hanlon, 38 Mont. 557, 100 P. 1035; Green v. U. S., 2 Okla. Cr. 55, 101 P. 112.

30. P. v. Osmond, 138 N. Y. 80, 33 N. E. 739; Polin v. S., 14 Neb. 540, 16 N. W. 898; S. v. Downs, 91 Mo. 19, 3 S. W. 219; S. v. Rollins, 113 N. C. 722, 18 S. E. 294; C. v. Straesser, 153 Pa. 451, 26 A. 17; Redus v. P., 10 Colo. 208, 14 P. 323; Grissom v. S., 8 Tex. Ap. 386; S. v. Churchill, 52 Wash. 210, 100 P. 309;

31. New Crim. Law, I, §§ 325, 434.

32. Ib.; §§ 204 et seq., 438, 440, 441.

33. Ante, § 609.

influenced his mind, or in any way contributed to the doing.[34]

To particularize,—

§ 612. *Specially of the Character of the Deceased:*—

The Prosecutor—cannot affirmatively show[35] that the person slain was of good or peaceable character.[36] But in rebuttal this evidence is competent if the opposite has been testified to for the defense,[37] or sometimes if self-defense is in issue,[38] but not a character acquired after the homicide[39] or too long before.[40]

§ 613. 1. **Not even the Defendant,**—it is believed, may bring forward in evidence the bad character of the deceased in general, where he does not particularize the trait, or prove an evil trait not related to the special matter of the defense.[41] Even he cannot show the trait until a founda-

34. S. v. Meader, 47 Vt. 78; S. v. Dumphey, 4 Minn. 438; Carr v. S., 14 Ga. 358; P. v. Henderson, 28 Cal. 465; Peterson v. S., 50 Ga. 142; S. v. Maloy, 44 Iowa, 104; S. v. McCoy, 29 La. Ann. 593; Edgar v. S., 43 Ala. 45; S. v. Gregor, 21 La. Ann. 473; Atkins v. S., 16 Ark. 568; S. v. Smith, 12 Rich. 430.

35. S. v. McCarthy, 43 La. Ann. 541, 9 So. 493.

36. S. v. Potter, 13 Kan. 414; Dock v. C., 21 Grat. 909; Pound v. S., 43 Ga. 88; P. v. Anderson, 39 Cal. 703; Ben v. S., 37 Ala. 103; P. v. Bezy, 67 Cal. 223; McKeone v. P., 6 Colo. 346; Jones v. P., 6 Colo. 452, 45 Am. R. 526; Twitty v. S., 168 Ala. 59, 53 So. 308; Bloomer v. S., 75 Ark. 297, 87 S. W. 438; Turner v. S., 131 Ga. 761, 63 S. E. 294; Kelly v. P., 229 Ill. 81, 82 N. E. 198.

37. Pound v. S., supra; Graves v. S., 14 Tex. Ap. 113; Bryant v. S., 95 Ark. 239, 129 S. W. 295; S. v. Woodward, 191 Mo. 617, 90 S. W. 90; Earles v. S., 52 Tex. Cr. 140, 106 S. W. 138; Canon v. S., 59 Tex. Cr. Ap. 398, 128 S. W. 141.

38. S. v. Pettit, 119 Mo. 410, 24 S. W. 1014; Pate v. S., 162 Ala. 32, 50 So. 357; S. v. Wiggins, 7 Pen. (Del.) 127, 76 A. 632; S. v. Rutledge, 135 Iowa, 581, 113 N. W. 461; S. v. Green, 229 Mo. 642, 129 S. W. 700; S. v. Roderick, 77 Ohio, 301, 82 N. E. 282.

39. Skaggs v. S., 31 Tex. Cr. 563, 21 S. W. 257.

40. Vol. II, § 1118; May v. P., 8 Colo. 210, 6 P. 816.

41. Plasters v. S., 1 Tex. Ap. 673, 683; Fahnestock v. S., 23 Ind. 231, 238; S. v. Smith, 12 Rich. 430, 443; Abbott v. P., 86 N. Y. 460; Spivey v. S., 58 Miss. 858; Bowles v. S., 58 Ala. 335; S. v. Mitchell, 41 La. Ann. 1073, 6 So. 785; Baker v. S., 122 Ala. 1, 26 So. 194; Smith v. S., 142 Ala. 14, 39 So. 329; Burnett v. P., 204 Ill. 208, 68 N. E. 505, 66 L. R. A. 304, 98 Am. St. 206.

tion for it is laid in the contentions and other proofs of the case.[42] But—

2. **When the Foundation**—is thus laid,[43]—as, when he, claiming to have acted in self-defense, has shown that the deceased attacked him,[44]—he may then give evidence of a generally known evil trait of a sort which might properly influence his conduct;[45] as, that the attacking person was in character quarrelsome and dangerous.[46] On the other hand,—

42. Stevens v. S., 1 Tex. Ap. 591; S. v. Riddle, 20 Kan. 711; S. v. Brien, 10 La. Ann. 453; S. v. Dumphey, 4 Minn. 438; S. v. Meader, 47 Vt. 78; P. v. Williams, 17 Cal. 142; Eiland v. S., 52 Ala. 322; Wesley v. S., 37 Miss. 327, 75 Am. D. 62; S. v. Jackson, 12 La. Ann. 679; S. v. Thawley, 4 Harring. (Del.) 562; Jolly v. S., 13 Sm. & M. 223; S. v. Tilly, 3 Ire. 424; S. v. Duncan, 6 Ire. 236; Drake v. S., 75 Ga. 413; Walker v. S., 28 Tex. Ap. 503; Roten v. S., 31 Fla. 514, 12 So. 910; Evers v. S., 31 Tex. Cr. 318, 37 Am. St. 811, 20 S. W. 744; S. v. Labuzan, 37 La. Ann. 489; S. v. Janvier, 37 La. Ann. 644; S. v. Jackson, 37 La. Ann. 896; Oder v. C., 80 Ky. 32; Williams v. S., 14 Tex. Ap. 102, 46 Am. R. 237; S. v. Birdwell, 36 La. Ann. 859; S. v. Watson, 36 La. Ann. 148; S. v. Jackson, 33 La. Ann. 1087; Roberts v. S., 5 Tex. Ap. 141; S. v. Chavis, 80 N. C. 353; Com. v. Rivet, 205 Mass. 464, 91 N. E. 877; Seaborn v. Com., 25 Ky. L. 2203, 80 S. W. 223.

43. Ib.; Palmore v. S., 29 Ark. 248; Horbach v. S., 43 Tex. 242; S. v. Downs, 91 Mo. 19, 3 S. W. 219; Jackson v. S., 90 Ala. 590, 8 So. 862; S. v. Turner, 29 S. C. 34, 13 Am. St. 706, 6 S. E. 891; Lang v. S., 84 Ala. 1, 5 Am. St. 324, 4 So. 193; Gardner v. S., 90 Ga. 310, 35 Am. St. 202, 17 S. E. 86; Garner v. S., 28 Fla. 113, 29 Am. St. 232, 9 So. 835; King v. S., 90 Ala. 612, 8 So. 856; Hudson v. S., 6 Tex. Ap. 565, 32 Am. R. 593; King v. S., 55 Ark. 604, 19 S. W. 110; S. v. Hayden, 83 Mo. 198; P. v. Stock, 1 Idaho, n. s., 218; S. v. Ford, 37 La. Ann. 443; S. v. Banner, 149 N. C. 519, 63 S. E. 84; S. v. Peterson, 149 N. C. 533, 63 S. E. 87.

44. S. v. Robertson, 30 La. Ann. 340; Reg. v. Macarthy, 3 Russ. Crimes (5th Eng. Ed.) 361, note; Davidson v. P., 4 Colo. 145. And see the argument of counsel in Pfomer v. P., 4 Par. Cr. 558, 580 et seq.; S. v. McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. 661.

45. Ante, § 610; Reg. v. Macarthy, supra; Martin v. S., 90 Ala. 602, 24 Am. St. 844, 8 So. 858; Mulkey v. S., 5 Okla. Cr. Ap. 75, 113 P. 532.

46. S. v. Robertson, supra; S. v. Meader, 47 Vt. 78; S. v. Keene, 50 Mo. 357; S. v. Bryant, 55 Mo. 75; S. v. Turpin, 79 N. C. 473; Childers v. S., 30 Tex. Ap. 160, 28 Am. St. 899; S. v. Graham, 61 Iowa, 608, 16 N. W. 743; Doyal v. S., 70 Ga. 134, 147; Williams v. S., 74 Ala. 18; Moore v. S., 15 Tex. Ap. 1; S. v.

§ 614. **Where the Defendant made the Attack,**—as appearing on the direct proofs, and he persisted in the quarrel, evidence of the quarrelsome character of the deceased is not admissible.[47] For one has no greater right to attack or kill a quarrelsome body than a peaceable; but in self-defense, a man set upon may adapt his measures to the seeming danger, which increases with the dangerous character of the assailant.

§ 615. **Limits of Doctrine.**—These cases, wherein it is plain which party made the attack, with the conclusion that the deceased's quarrelsomeness may be shown when the one did, not when the other, present the doctrine clearly and justly. But evidence to the dangerous character may be admissible though it is not proved from which side the original aggression came.[48] Then the question becomes more difficult. We have seen what is the principle; namely, that the character of the one party, as known to the other, may be shown when, and only when, it might lawfully influence the latter's conduct. The facts of cases vary, and so in a degree will the opinions of different judges on the same facts. A minuter looking into the varying cases would little benefit the reader.[49] Still,—

Gooch, 94 N. C. 987. A city marshal accused of murder, may show general character of deceased for vindictiveness and hostility to his class. S. v. Spangler, 64 Kan. 661, 68 P. 39.

47. P. v. Garbutt, 17 Mich. 9, 97 Am. D. 162; Pritchett v. S., 22 Ala. 39, 58 Am. D. 250. But see S. v. Nett, 50 Wis. 524, 7 N. W. 344; S. v. McNeely, 34 La. Ann. 1022; S. v. Weathers, 127 La. 930, 54 So. 290.

48. See and compare S. v. Bryant, 55 Mo. 75; S. v. Turpin, 77 N. C. 473; S. v. Harris, 59 Mo. 550; C. v. Flanigan, 8 Phila. 430; P. v. Edwards, 41 Cal. 640; Fields v. S., 47 Ala. 603, 11 Am. R. 771; S. v. Keene, 50 Mo. 357; Queenberry v. S., 3 Stew. & P. 308; Rippy v. S., 2 Head, 217.

49. Thomas v. P., 67 N. Y. 218; P. v. Lombard, 17 Cal. 316; Pridgen v. S., 31 Tex. 420; S. v. Elkins, 63 Mo. 159; S. v. Brown, 63 Mo. 439; Marts v. S., 26 Ohio St. 162; Pritchett v. S., 22 Ala. 39; S. v. Matthews, 78 N. C. 523; S. v. Field, 14 Me. 244, 249, 31 Am. D. 52; C. v. Mead, 12 Gray, 167, 169, 71 Am. D. 741 (partly overruled in C. v. Barnacle, 134 Mass. 215, 217); Franklin v. S., 29 Ala. 14, 17; Dupree v. S., 33 Ala. 380, 73 Am. D. 422; Payne v. C., 1 Met. Ky. 370; Rippey v. S., 2 Head, 217; Pfomer v. P., 4 Par. Cr. 558; S. v. Floyd, 6 Jones (N. C.) 392; S. v. Tackett, 1 Hawks,

§ 616. **Attacking Party Uncertain.**—It is reasonably well established, in a case of doubt by which party the attack was made, yet the defendant claims to have acted in self-defense,[50] that then, the whole evidence being circumstantial,[51] he may prove what he knew of the dangerous character of the person whose life he took.[52] This case seems to stand on reasons other than those just explained.

§ 617. **The Nature and Proof of "Character"**—were, as to another question, explained in the first volume.[53] Here, as there, character does not consist of individual acts, and they cannot be shown in evidence.[54] While differing from reputation, it is evidenced thereby; so that a witness should testify to what others say of it, not to his own opinion thereon.[55]

§ 618. *Prior Conduct and Acts of the Deceased:—*

In General Terms,—prior acts of the deceased, when connected with the transaction in which his life was taken, are competent in explanation of the killing;[56] as, that the day

210; Cotton v. S., 31 Miss. 504; P. v. Butler, 8 Cal. 435; Haynes v. S., 17 Ga. 465; C. v. Hilliard, 2 Gray, 294.

50. Monroe v. S., 5 Ga. 85; S. v. Hicks, 27 Mo. 588; Quesenberry v. S., 3 Stew. & P. 308.

51. S. v. Barfield, 8 Ire. 344.

52. Dukes v. S., 11 Ind. 557, 565, 71 Am. D. 370; P. v. Murray, 10 Cal. 309. See Fahnestock v. S., 23 Ind. 231, 237, 238; Wise v. S., 2 Kan. 419, 85 Am. D. 595; Harman v. S., 3 Head, 243; S. v. Turpin, 77 N. C. 473; S. v. Pearce, 15 Nev. 188.

53. Vol. II, §§ 1117, 1118.

54. Alexander v. C., 105 Pa. 1; S. v. Peffers, 80 Iowa, 580; Stalcup v. S., 146 Ind. 270, 45 N. E. 334; Thornton v. S., 107 Ga. 683, 33 S. E. 673.

55. Vol. II, § 1117; Harrison v. C., 79 Va. 374, 52 Am. R. 634; Jackson v. S., 77 Ala. 18; Branch v. S., 15 Tex. Ap. 96; Eggler v. P., 56 N. Y. 642; Pratt v. S., 56 Ind. 179; S. v. Baker, 30 La. Ann. 1134; Franklin v. S., 29 Ala. 14; Thomas v. P., 67 N. Y. 218, 223; S. v. Glass, 5 Ore. 73; Wright v. S., 43 Tex. 170; Carr v. S., 14 Ga. 358; S. v. Colvin, 226 Mo. 446, 126 S. W. 448.

56. P. v. Harris, 95 Mich. 87, 54 N. W. 648; Myers v. S., 62 Ala. 599; S. v. Smith, 12 Rich. 430, 443; Lister v. S., 3 Tex. Ap. 17; S. v. Testerman, 68 Mo. 408; Reynolds v. S., 1 Kelly, 222. For circumstances in which they are not competent, see S. v. Jefferson, 43 La. Ann. 995, 10 So. 199; Brinkley v. S., 89 Ala. 34, 18 Am. St. 87, 8 So. 22; P. v. Clark, 84 Cal. 573, 24 P. 313; S. v. Sullivan, 51 Iowa, 142, 50 N. W. 572; Bond v. S., 21 Fla. 738; S. v. Thomas, 151 Ia. 572, 132 N. W. 51; S. v. Crosby,

before, he had been quarrelsome and violent, had attacked a third person, and on the defendant's interfering to separate them, had threatened him.[57] More particularly as to—

§ 619. *Threats by the Deceased:*—

One has no Right—to seek out and kill another who has threatened his life. The law's step for him is rather to compel the other to find sureties of the peace or lie in prison. Or, if the two meet, he must not inflict on the other any violence as in self-defense until there has been some overt act evincing a present purpose to carry out the threat. But when such act is done, and the danger appears imminent, the self-defense may begin.[58] Therefore,—

§ 620. 1. **When not Admissible.**—If in violation of this rule, the threatened person kills the other who has made no overt demonstration against him, he cannot even lay before the jury the known threats on which he thus unlawfully acted.[59] So that—

2. **Only after a Foundation**—for the admission of threats has been laid in the contentions or proofs, showing special grounds, will they be received.[60] But—

88 S. C. 98, 70 S. E. 440. But not specific acts of crime. Chaplin v. Com., 142 Ky. 782, 135 S. W. 298.

57. S. v. Smith, supra. And see Campbell v. P., 16 Ill. 17; Holler v. S., 37 Ind. 57, 10 Am. R. 74; P. v. Turley, 50 Cal. 469; Bird v. S., 55 Ga. 317; Kelsoe v. S., 47 Ala. 573; Holloway v. C., 11 Bush, 344; Fahnestock v. S., 23 Ind. 231, 238; S. v. Dodson, 4 Ore. 64.

58. Nash v. S., 2 Tex. Ap. 362; Holloway v. C., 11 Bush, 344; U. S. v. Rice, 1 Hughes, 560; Peck v. S., 5 Tex. Ap. 611; Pritchett v. S., 22 Ala. 39, 58 Am. D. 250; P. v. Arnold, 15 Cal. 476; Allen v. S., 17 Tex. Ap. 637; P. v. Cook, 39 Mich. 236, 33 Am. R. 380; Alexander v. S., 25 Tex. Ap. 260, 8 Am. St. 438; S. v. Spell, 38 La. Ann. 20; Thompson v. S., 6 Okla. Cr. 50, 117 P. 216.

59. S. v. Alexander, 66 Mo. 148; S. v. Brown, 63 Mo. 439; S. v. Taylor, 64 Mo. 358; Holly v. S., 55 Miss. 424; U. S. v. Leighton, 3 Dak. 29; U. S. v. Knowlton, 3 Dak. 58; Turpin v. S., 55 Md. 462. And see P. v. Turley, 50 Cal. 469; Bird v. S., 55 Ga. 317; Ragsdale v. S., 134 Ala. 24, 32 So. 674; Osburn v. S., 164 Ind. 262, 73 N. E. 601.

60. Ante, §§ 609-611, 613; S. v. Ridgely, 2 Har. & McH. 120, 1 Am. D. 372; S. v. Jackson, 17 Mo. 544, 59 Am. D. 281; Halbert v. S., 31 Tex. 357; P. v. Glenn, 10 Cal. 32; Williams v. S., 2 Tex. Ap. 271; S. v. Bouvy, 124 La. 1054, 50 So. 849. Ex parte Fraley, 4 Okla. Cr. Ap. 91, 111

§ 621. 1. **If the Defendant's Contention**—is, for example, that the alleged killing was in self-defense, or was only manslaughter, he may prove that before the encounter the deceased had made threats against his person or life, and they had been communicated to him; "as tending," said Coleman, J.,[61] "to show that in the assault on the deceased he may have acted under a just fear of danger to his own life."[62] Yet—

2. **If he did not know**—of the threats, the ground of their admissibility fails, and, at least under all ordinary circumstances, they should be rejected.[63] Also,—

P. 662; White v. S., 4 Okla. Cr. Ap. 143; 111 P. 1010; Black v. S., 84 Ark. 121, 104 S. W. 1104; P. v. Quimby, 6 Cal. Ap. 482, 92 P. 493; Warford v. P., 41 Colo. 203, 92 P. 24; S. v. Davis, 51 Ore. 136, 96 P. 44; Dunn v. S., 143 Ala. 67, 39 So. 147; Ellis v. S., 152 Ind. 326, 52 N. E. 82; S. v. Burton, 63 Kan 602, 66 P. 633; S. v. Frierson, 51 La. Ann. 706, 25 So. 396; S. v. Perioux, 107 La. 601, 31 So. 1016; S. v. Byrd, 121 N. C. 684, 28 S. E. 353.

61. Powell v. S., 19 Ala. 577, 581.

62. Pitman v. S., 22 Ark. 354, 357; Hudgins v. S., 2 Kelly, 173; Williams v. P., 54 Ill. 422; Dupree v. S., 33 Ala. 380, 73 Am. D. 422; Monroe v. S., 5 Ga. 85; S. v. Harrington, 12 Nev. 125; S. v. Lee, 66 Mo. 165; Howell v. S., 5 Ga. 48; Powell v. S., 52 Ala. 1; S. v. Dodson, 4 Ore. 64; S. v. Abbott, 8 W. Va. 741; King v. S., 9 Tex. Ap. 515; S. v. Coella, 3 Wash. 99, 28 P. 28; Wood v. S., 92 Ind. 269; S. v. Harrod, 102 Mo. 590, 15 S. W. 373; P. v. Travis, 56 Cal. 251; Hawthorne v. S., 61 Miss. 749. And see P. v. Rector, 19 Wend. 569; Campbell v. P., 16 Ill. 17; Ballard v. S., 31 Fla. 266, 12 So. 865. Even communicated threats are not in all circumstances admissible. Payne v. S., 60 Ala. 80; Thomas v. S., 11 Tex. Ap. 315; P. v. Taing, 53 Cal. 602; Leigh v, P., 113 Ill. 372; West v. S., 18 Tex. Ap. 640; Smith v. S., 25 Fla. 517, 6 So. 482; P. v. Halliday, 5 Utah, 467, 17 P. 118; Hinson v. S., 66 Miss. 532, 6 So. 463; Ridgell v. S., 1 Ala. Ap. 94, 55 So. 327; Rouse v. S., 135 Ga. 1910, 227, 69 S. E. 180; S. v. Burton, 63 Kan. 662, 66 P. 633; S. v. Davis, 127 La. 263, 53 So. 558; S. v. Werner, 128 La. 1, 54 So. 402; S. v. Smith, 164 Mo. 567, 65 S. W. 270; Saunders v. S., 4 Okla. Cr. Ap. 264, 111 P. 965; Offitt v. S., 5 Okla. Cr. Ap. 48, 113 P. 554.

63. Ante, § 611; Keener v. S., 18 Ga. 194, 63 Am. D. 269; Atkins v. S., 16 Ark. 568; Newcomb v. S., 37 Miss. 383; Lingo v. S., 29 Ga. 470; Coker v. S., 20 Ark. 53; Powell v. S., 19 Ala. 577; Carr v. S., 14 Ga. 358; P. v. Henderson, 28 Cal. 465; Peterson v. S., 50 Ga. 142; S. v. Gregor, 21 La. Ann. 473; S. v. McCoy, 29 La. Ann. 593; S. v. Maloy, 44 Iowa, 104; Edgar v. S., 43 Ala. 45; P. v. Arnold, 15 Cal. 476; S. v. Harris, 59 Mo. 550; Hudgins v. S., 2 Kelly, 173; S. v. Jackson, 17 Mo.

3. **Recent**—must be the threats to be thus admissible. The decisions have fixed no limit of time;[64] probably none is possible. In reason, they should not be of so long ago that presumably the prompting evil mind has relented.[65] Hence,—

§ 622. If there are Repeated Threats,—extending through a considerable period, and together they constitute one series of acts, the earlier may be shown in connection with the later, when any are admissible.[66] And if a part only are known to the prisoner, the uncommunicated ones may be given in evidence with the others.[67] The doctrine of the *res gestae* [68] and some other consideration support this proposition.

§ 623. *Threats and other Utterances of the Deceased as of the Res Gestae and as Dying Declarations*:—

1. **Not a Party**—to the prosecution is the deceased person, so that the law looks upon his utterances as hearsay. And except as to dying declarations,[69] the fact that he is dead does not render admissible what would not be if he had survived and the prosecution were for the battery.[70] The case is the common one of lost evidence, the recovery whereof is beyond human power. Therefore—

544, 59 Am. D. 281; S. v. Ridgely, 2 Har. & McH. 120, 1 Am. D. 372; P. v. Garbutt, 17 Mich. 9, 97 Am. D. 162; S. v. Ryan, 30 La. Ann. 1176. See post, § 627; Fuller v. S., 30 Tex. Ap. 559; S. v. Perioux, 107 La. 601, 31 So. 1016; S. v. Smith, 164 Mo. 567, 65 S. W. 270; Sasser v. S., 129 Ga. 541, 59 S. E. 255; Henson v. S., 112 Ala. 41, 21 So. 79; P. v. Farley, 124 Cal. 594, 57 P. 571; P. v. Lyons, 7 Ida. 530, 64 P. 236; Ellis v. S., 152 Ind. 326, 52 N. E. 82; S. v. Byrd, 121 N. C. 684, 28 S. E. 353; S. v. Cushing, 17 Wash. 544, 50 P. 512. Contra, Echols v. S. (Miss. 1911), 55 So. 485.

64. Monroe v. S., 5 Ga. 85; S. v. Jackson, 17 Mo. 544; S. v. Hays, 23 Mo. 287. See Keener v. S., 18 Ga. 194; Stafford v. S., 50 Fla. 134, 39 So. 106; S. v. Beckner, 194 Mo. 281, 91 S. W. 892.

65. And see Vol. II, §§ 1110, 1111.

66. S. v. Sloan, 47 Mo. 604, 610.

67. Cornelius v. C., 15 B. Monr. 539; S. v. Turpin, 77 N. C. 473; Davidson v. P., 4 Colo. 145. And see Thrasher v. S., 3 Tex. Ap. 281; Aycock v. S., 2 Tex. Ap. 381.

68. Vol. II, §§ 1083, 1084.

69 Vol. II, § 1207 et seq.

70. Vol. II, § 1082; C. v. Densmore, 12 Allen, 535, 537, 538; Lund v. Tyngsborough, 9 Cush. 36, 40.

2. **The Declarations of the Deceased,**—as of any other third person, when not of the *res gestae,* or dying declarations, or communicated to the defendant so as possibly to influence his conduct, are excluded by rules which are supposed to promote justice on the whole; at all events, which have become parts of the common law, not within the discretion of the courts to set aside. Hence, they are not admissible.[72] But—

§ 624. **The Dying Declaration**—of the deceased are, in these cases of homicide, and within limits explained in the first volume, admissible as an exception, and the only one, to the rules governing other criminal causes.[73] Common to all causes, criminal and civil, are the doctrines of the—

§ 625. 1. **Res Gestae.**—A general view of the law of the *res gestae*—that is, of the admissibility in evidence of the whole of a transaction any part of which is duly shown to the jury—appears in the first volume. The transaction need not be on one day, but it may be continuous, from day to day.[74] Within which doctrine,—

2. **Contemporary Utterances,**—including threats and declarations of the deceased, not on other principles admissible, are often competent. Yet it is impossible to state,

71. Vol. II, §§ 1083-1087.

72. Faire v. S., 58 Ala. 74; Donnelly v. S., 2 Dutcher, 463, 601; Binns v. S., 57 Ind. 46, 26 Am. R. 48; C. v. Densmore, 12 Allen, 535; P. v. McLaughlin, 44 Cal. 435; S. v. Dula, Phillips (N. C.) 211; Armistead v. S., 18 Ga. 704; Jackson v. S., 52 Ala. 305; S. v. Vincent, 24 Iowa, 570, 95 Am. D. 753; Denton v. S., 1 Swan (Tenn.) 279; Kirby v. S., 9 Yerg. 383, 30 Am. D. 420; S. v. Patrick, 3 Jones (N. C.) 443; S. v. Rash, 12 Ire. 382, 55 Am. D. 420; Miller v. S., 9 Ga. Ap. 599, 71 S. E. 1021; Cooper v. S., 123 Tenn. 37, 138 S. W. 826; Kemper v. S. (Tex. 1911), 138 S. W. 1025.

73. Vol. II, §§ 1207-1216; S. v. Brunetto, 13 La. Ann. 45; S. v. Williams, 67 N. C. 12; Nelms v. S., 13 Sm. & M. 500, 506, 53 Am. D. 94; Binns v. S., 46 Ind. 311; Smith v. S., 53 Ala. 486; P. v. Ybarra, 17 Cal. 166; S. v. McEvoy, 9 S. C. 208; Coatney v. S., 61 Fla. 19, 55 So. 285.

74 Vol. II, §§ 1083-1087, 1111, 1125 (2); S. v. Nelson, 166 Mo. 191, 65 S. W. 749; P. v. Del Vermo, 192 N. Y. 570, 85 N. E. 690; Baker v. S., 85 Ark. 300, 107 S. W. 983; Herrington v. S., 130 Ga. 307, 60 S. E. 572; Tinsley v. S., 52 Tex. Cr. 91, 106 S. W. 347.

on the authorities, they being not altogether harmonious, any practical and clearly defined rule to distinguish those which will be received from those which will not. In general accord with the combined adjudications, and on principle, the declarations of the deceased, or of any other third person who participated in the transaction which ended in death, including utterances from all sources within the same reason, may be shown when either they, or some fact which they tend to explain, may be deemed a part of such transaction, whether the same were performed on one day or extended through many days; and provided that either the declaration, or the fact it would illustrate, is pertinent to the main inquiry.[75]

75. Numerous minor questions have arisen within the scope of this paragraph. Thus, in a treason trial, the cry of a mob to which the defendant was privy, was admitted against him. Rex v. Gordon, 21 How. St. Tr. 485, 535. In a murder case, it appearing that the last time the deceased was seen alive she was leaving her lodgings, the witness was permitted to be asked whether or not she then made a statement, yet not what it was. Reg. v. Wainwright, 13 Cox C. C. 171, 172, 14 Eng. Rep. 623, 625; s. p., adjudged by Bovill, C. J. Reg. v. Pook, 13 Cox C. C. 172, note 14 Eng. Rep. 625, 3 Russ. Crimes (5th Eng. Ed.) 351, note. This seems to be contrary to Carroll v. S., 3 Humph. 315. But other American cases are more or less in accord with this ruling. Kirby v. S., 9 Yerg. 383, 30 Am. D. 420; S. v. Dula, Phillips (N. C.) 211; P. v. Williams, 3 Abb. Ap. 596; S. v. Vincent, 24 Iowa, 570, 95 Am. D. 753; Territory v. Couk, 2 Dak. 188. See Hunt v. P., 3 Par. Cr. 569; Burns v. S., 49 Ala. 370; Reynolds v. S., 1 Kelly, 222; Campbell v. P., 16 Ill. 17; Autauga v. Davis, 32 Ala. 703; S. v. Howard, 32 Vt. 380. Again, a transaction which ends in death often extends through a series of days, or even of months. Then, while it is in progress, what is said by one or both of the parties thereto will, if the necessary other facts concur, be deemed of the res gestae. Consequently, threats by the deceased, or other declarations by him, when duly connected with any part of such transaction, may be shown in the defense. Pitman v. S., 22 Ark. 354; P. v. Arnold, 15 Cal. 476; Monroe v. S., 5 Ga. 85; Williams v. P., 54 Ill. 422; Campbell v. P., 16 Ill. 17; Dixon v. S., 13 Fla. 636; S. v. Sloan, 47 Mo. 604; and other cases to be cited as we proceed. There may be a question whether particular facts are within or without this rule. Where, in England, a man was tried for the murder of his wife and it was in evidence that having often beat her, he killed her with a poker, it was shown against him that a week before the killing she came to the house of the wit-

§ 626. 1. **The Bodily Condition or Sufferings**—of the deceased is another thing upon which his declarations may be admissible, as being of the *res gestae*. Thus, his state-

76. Vol. II, § 1111; 1 Greenl. Ev., § 102; Insurance Co. v. Mosley, 8 Wal. 397; S. v. Harris, 63 N. C. 1; Illinois Central Rld. v. Sutton, 42 Ill. 438; Looper v. Bell, 1 Head, 373; Phillips v. Kelly, 29 Ala. 628; Gray v. McLaughlin, 26 Iowa, 279; Hyatt v. Adams, 16 Mich. 180; Baker v. Griffin, 10 Bosw. 140; Caldwell v. Murphy, 1 Kern. 416; S. v. Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

(75 Continued.)

ness with a carving-knife and a large axe. Thereupon the witness was permitted to state what she said; namely, "Please to put them up, and when I want them I'll fetch them; for my husband always threatens me with these, and when they are out of the way I feel safer." Reg. v. Edwards, 12 Cox C. C. 230, 4 Eng. Rep. 518. Mr. Moak has attached to this case, as reprinted in 4 Eng. Rep., a note questioning, on many authorities, this decision. The report of the case is brief; but assuming that a series of threats and assaults had been shown, extending down to the time of the fatal blow, making the evidence that the woman carried the knife and axe to a neighbor's house admissible as a part of the connected series, it seems to me that what she said while performing this act was of the res gestae, and therefore properly admitted. But such mere words, unconnected with any act, would not be competent. So it was held in Indiana, as to mere declarations of the deceased; the court, by Pettit, J. observing: "We think the books may be searched without success, to find a case where the statements of a murdered man, made before he came in sight or hearing of his slayer, can be given in evidence against the accused on his trial." Cheek v. S., 35 Ind. 492, 494. In a Connecticut case, the deceased was an aged woman with whom the defendant lived as her hired man; she had been found lying on her face dead, in a pool near the house, and the theory of the defense was that she had fallen into it in a fit. The court rejected evidence of her declaration, made about a year before, that she was subject to fits, and had several times when taken with them fallen on her face. S. v. Dart, 29 Conn. 153, 156, 76 Am. D. 596. So the courts have rejected the declarations of a deceased wife, for the murder of whom the husband was on trial, that she had been guilty of adultery. S. v. Rash, 12 Ire. 382, 55 Am. D. 420. Also declarations of the deceased that he was afraid another person than the prisoner would kill him. S. v. Patrick, 3 Jones (N. C.) 443. A declaration made in connection with an act is not admissible unless the act is also. P. v. Williams, 3 Abb. Ap. 596. And see S. v. Harris, 59 Mo. 550. If two persons, each in the absence of the other, prepare for a hostile encounter, and on their

ments after receiving a wound, explanatory of the injury, are competent; but not as to who inflicted it, or with what weapon.[77] And in general terms, where the health of the

77. Denton v. S., 1 Swan (Tenn.), 279; S. v. Estoup, 39 La. Ann. 219, 1 So. 448. And see Smith v. S., 53 Ala. 486; P. v. Robinson, 2 Par. Cr. 235; S. v. Wagner, 61 Me. 178; S. v. Davidson, 30 Vt. 377, 73 Am. D. 312; Vol. II, § 1111; Offitt v. S., 5 Okla. Cr. Ap. 48, 113 P. 554.

(75 Continued.)

meeting one is killed, such preparations would seem in reason to be parts of the criminal transaction. Then, on a trial for the homicide, the declarations of the respective parties, while making the preparations, would appear to be of the res gestae. In proper circumstances, therefore, why should they not be admissible? Thus, in a California case, it appearing that the deceased had a pistol, the defendant was permitted to prove what he said at the time of procuring it. P. v. Arnold, 15 Cal. 476, 481, 482. So, in another California case, where, on the day of the homicide, the deceased exhibited to a witness a pistol which was present at the affray, the witness was permitted to testify to threats then made by the deceased against the defendant though not communicated to him. The doctrine appears to be that the exhibiting or procuring of the pistol being a part of the transaction which ended in death, so likewise was what the man said while doing it; all was of the res gestae. Still, this sort of evidence is admissible only when relevant. P. v. Scoggins, 37 Cal. 676, 686. A case like these two California ones is Wiggins v. P., 93 U. S. 465, decided by the Supreme Court of the United States. There, in a series of transactions which ended in murder, the deceased, just before receiving the fatal blow, showed a pistol to the witness, who was thereupon permitted to testify to his accompanying words; namely, that with it he should shoot the defendant before morning. For further cases relating to this question, see S. v. Jackson, 17 Mo. 544, 59 Am. D. 281; Holler v. S., 37 Ind. 57, 10 Am. R. 74; Kirby v. S., 9 Yerg. 383; Carroll v. S., 3 Humph. 315; Bassham v. S., 38 Tex. 622; Campbell v. P., 16 Ill. 17; Keener v. S., 18 Ga. 194, 63 Am. D. 269; Lingo v. S., 29 Ga. 470. In these cases, the reader should bear in mind, there was a relevant act accompanying the declaration. That is essential. S. v. Gregor, 21 La. Ann. 473; Lund v. Tyngsborough, 9 Cush. 36, 44; Tomkies v. Reynolds, 17 Ala. 109; Sessions v. Little, 9 N. H. 271; Robertson v. Smith, 18 Ala. 220; C. v. O'Connor, 11 Gray, 94; Gilbert v. Gilbert, 22 Ala. 529, 58 Am. D. 268; Fail v. McArthur, 31 Ala. 26; Patten v. Ferguson, 18 N. H. 528; Morrill v. Foster, 32 N. H. 358; Currier v. Boston, etc. Rld., 34 N. H. 498; P. v. Williams, 3 Par. Cr. 84; Bassham v. S., 38 Tex. 622. But doubtless the two need not be in the strictest sense simultaneous. If a man should say, "I am going to shoot A, for he has

deceased at a given time is a relevant subject of inquiry, what he then said of it may be shown.[78] In like manner,—

78. Reg. v. Johnson, 2 Car. & K. 354; Johnson v. S., 17 Ala. 618; Howe v. Plainfield, 41 N. H. 135; Perkins v. Concord Rld., 44 N. H. 223; Hunt v. P., 3 Par. Cr. 569; Lush v. McDaniel, 13 Ire. 485, 57 Am. D. 566; Kent v. Lincoln, 32 Vt. 591.

(75 Continued.)

insulted me," then should reach out his hand, take a gun, and discharge it; or, if he should shoot first, and add, "I have shot A, for he has insulted me," his words, in either case, would be as truly of the res gestae as if spoken while his finger was drawing the trigger. But how long before or after an act may the words be spoken and still be of the res gestae? The courts have never answered this question by a rule, and it is not probable they ever can. "At or about the time," or "near," or "shortly before," or "shortly after," or "immediately after," is as exact as they have come to the solution of the difficulty by any statement of time. Pitman v. S., 22 Ark. 354; Campbell v. P., 16 Ill. 17; Reg. v. Johnson, 2 Car. & K. 354; Little v. C., 25 Grat. 921; Hill v. C., 2 Grat. 594; Reynolds v. S., 1 Kelly, 222; Dixon v. S., 13 Fla. 636; Burns v. S., 49 Ala. 370; Reg. v. Lunny, 6 Cox C. C. 477; Meek v. Perry, 36 Miss. 190; Mayes v. S., 64 Miss. 329, 1 So. 733, 60 Am. R. 58; S. v. Estoup, 39 La. Ann. 219, 1 So. 448; P. v. Wong Ah Foo, 69 Cal. 180; Green v. S., 69 Ala. 6; Von Pollnitz v. S., 92 Ga. 16, 44 Am. St. 72, 18 S. E. 301. The inquiry would appear to be answered more correctly in another form by saying, as observed in the first volume, that the declarations "are competent whenever near enough to the act, either before or after it, to be probably prompted by the same motive, not an after thought, and apparently to constitute of it a part." Vol. II, § 1086 (1); West v. S., 2 Tex Ap. 460; Insurance Co. v. Mosley, 8 Wal. 397; Newcomb v. S., 37 Miss. 383; Johnson v. Sherwin, 3 Gray, 374; P. v. Vernon, 35 Cal. 49, 95 Am. D. 49; Mitchum v. S., 11 Ga. 615; Handy v. Johnson, 5 Md. 450; Goodwin v. Harrison, 1 Root, 80; Rutland v. Hathorn, 36 Ga. 380; Hart v. Powell, 18 Ga. 635; Monday v. S., 32 Ga. 672, 79 Am. D. 314; S. v. Dominique, 30 Mo. 585; P. v. Henderson, 28 Cal. 465. In one case it was held that a person on trial for murder cannot give in evidence his own conversations, had after going half a mile from the place of the homicide. Gardner v. P., 3 Scam. 83. See Caw v. P., 3 Neb. 357; Carroll v. S., 3 Humph. 315; Denton v. S., 1 Swan (Tenn.) 279; Reg. v. Lunny, 6 Cox C. C. 477; C. v. Hackett, 2 Allen, 136; Binns v. S., 57 Ind. 46, 26 Am. R. 48; Entwhistle v. Feighner, 60 Mo. 214; Armistead v. S., 18 Ga. 704; Jackson v. S., 52 Ala. 305; Monday v. S., 32 Ga. 672; Hunt v. P., 3 Par. Cr. 569; Faire v. S., 58 Ala. 74; C. v. McPike, 3 Cush. 181, 50 Am. D. 727. There are numerous other cases on this class of ques-

2. **Love or Hate.**—Where it is permissible to prove the mutual relations of the defendant and deceased,[79] the latter's declarations indicating love or hatred may be received in connection with the other facts; the same as, in an action for criminal conversation, where the terms on which the husband and wife cohabitated become important, her letters and verbal declarations may be given.[80] But—

§ 627. Threats neither Communicated nor of Res Gestae.—According to the current of the authorities,[81] under no circumstances are the mere uncommunicated threats of the deceased—not of the *res gestae* whereby they might assist to explain the transaction or some pertinent fact connected therewith, nor known to the defendant so as possibly to have influenced his conduct in even the slightest degree—admissible in his behalf. But of late a considerable number of the courts have held that if the evidence is only circumstantial as to what occurred at the fatal meeting, and it is important to know from which party the blows or other violence commenced, a prior threat from the deceased, neither communicated nor of the *res gestae,* may be received to this particular question only, as of some, not much, weight among, the presumptions.[82]

tions, but it must suffice to cite only a few. Sayres v. C., 88 Pa. 291; S. v. McCoy, 111 Mo. 517, 20 S. W. 240; Reg. v. Buckley, 13 Cox, C. C. 293; Means v. S., 10 Tex. Ap. 16, 38 Am. R. 640; Cox v. S., 8 Tex. Ap. 254, 34 Am. R. 746; Dickson v. S., 39 Ohio St. 73; P. v. Carlton, 57 Cal. 83, 40 Am. R. 112; Cluverius v. C., 81 Va. 787; Thomas v. S., 67 Ga. 460.

79. Post, § 630.

80. Trelawney v. Coleman, 1 B. & Ald. 90; Palmer v. Crook, 7 Gray, 418. And see Preston v. Bowers, 13 Ohio St. 1, 82 Am. D. 430.

81. Ante, §§ 619-621. And see cases cited at § 621; S. v. Maloy, 44 Iowa, 104; S. v. Elliott, 45 Iowa, 486, 490; Levy v. S., 28 Tex. Ap. 203, 19 Am. St. 826; Vaughn v. S., 88 Ga. 731, 16 S. E. 64; S. v. Vance, 32 La. Ann. 1177; Combs v. S., 75 Ind. 215; P. v. Campbell, 59 Cal. 243, 43 Am. R. 257; S. v. Fisher, 33 La. Ann. 1344; Harris v. S., 34 Ark. 469; P. v. Jackson, 111 N. Y. 362, 19 N. E. 54; S. v. Jackson, 32 S. C. 27, 10 S. E. 769; Hargis v. Com., 135 Ky. 578, 123 S. W. 239.

82. It is impossible to say precisely what cases ought to be cited to this proposition; but perhaps a writer arguing in favor of it would set down the following, with, it may be, some others: Stokes v. P., 53 N. Y. 164, 13 Am. R. 492; Wiggins v. P., 93 U. S. 465 (where are also cited Keener v. S., 18 Ga. 194, 63

For this modern extension of the rules of evidence reasons of some weight have been assigned, and equally good reasons could be given for numerous other extensions, especially in this way could the whole doctrine which excludes hearsay be overturned. A fundamental principle in our law of evidence is that since it is presented to a lay jury, it must be kept within such bounds that men unused to judicial discriminations will not be liable to misapply it; as here, it would not be easy so to instruct the panel that they would not give to the uncommunicated threat a weight to which it was not entitled.

III. *The Character, Conduct, and Utterances of the Defendant, and his Relations with the Deceased.*

§ 628. 1. In the Second Volume—were considered most of the questions within this sub-title; as,—

2. **Putting the Defendant's Character**—in evidence.[83]

3. **Showing another Crime**—against him.[84] Not often in homicide is this evidence relevant.[85] Yet where it brings

Am. D. 269; Campbell v. P., 16 Ill. 17; Holler v. S., 37 Ind. 57, 10 Am. R. 74; P. v. Arnold, 15 Cal. 476; P. v. Scoggins, 37 Cal. 676); Johnson v. S., 54 Miss. 430; S. v. Elkins, 63 Mo. 159; Pitman v. S., 22 Ark. 354; Stapp v. S., 1 Tex. Ap. 734, 739; Little v. S., 6 Bax. 491; S. v. Brown, 22 Kan. 222; Brown v. S., 55 Ark. 593, 18 S. W. 1051; S. v. Bailey, 94 Mo. 311, 7 S. W. 425; Hart v. C., 85 Ky. 77, 7 Am. St. 576, 2 S. W. 673; P. v. Alivtre, 55 Cal. 263; May v. S., 90 Ga. 793, 17 S. E. 108; Wilson v. S., 30 Fla. 234, 11 So. 556; Garner v. S., 28 Fla. 113, 29 Am. St. 232, 9 So. 835; Levy v. S., 28 Tex. Ap. 203, 19 Am. St. 826, 12 S. W. 596; S. v. McNally, 87 Mo. 644; Palmer v. P., 138 Ill. 356, 32 Am. St. 146, 28 N. E. 130. See Riddle v. Brown, 20 Ala. 412, 56 Am. D. 202; Ruby v. S., 9 Tex. Ap. 353; S. v. Depass, 45 La. Ann. 1151, 14 So. 77; S. v. Walsh, 44 La. Ann. 1122, 11 So. 811; Roberts v. S., 68 Ala. 156; Rouse v. S., 135 Ga. 227, 69 S. E. 180; S. v. Pruett, 49 La. Ann. 283, 21 So. 842.

83. Vol. II, §§ 1112-1119; P. v. Garbutt, 17 Mich. 9, 97 Am. D. 162; Hall v. S., 40 Ala. 698; Hogan v. S., 36 Wis. 226; Carr v. S., 135 Ind. 1, 41 Am. St. 408, 34 N. E. 533; S. v. McGreevey, 17 Idaho 453, 105 P. 1047; P. v. Cleminson, 250 Ill. 135, 95 N. E. 157; Com. v. Aston, 227 Pa. 106, 75 A. 1017; P. v. Von Gaasbeck, 189 N. Y. 408, 82 N. E. 718; S. v. Dickerson, 77 Ohio, 34, 82 N. E. 969.

84. Vol. II, §§ 1120-1129.

85. S. v. Lapage, 57 N. H. 245, 24 Am. R. 69; S. v. Hoyt, 13 Minn.

to view a series of crimes illustrating one another, whereof the homicide is one,[86] or discloses a motive for the killing,[87] and in various other circumstances,[88] it is competent.

4. **Confessions and Admissions**—by the defendant are explained in this first volume.[89] Also,—

§ 629. 1. **The Defendant's Conduct,**—after the offense is supposed to have been committed, as to its effect in evidence is considered in the first volume.[90] So his conduct before may be important; as,—

2. **His Prior Threats.**—are relevant.[91] And—

132; Hall v. U. S., 150 U. S. 76; S. v. Martin, 74 Mo. 547.

86. Reg. v. Cotton, 12 Cox C. C. 400, 5 Eng. Rep. 479; Reg. v. Roden, 12 Cox C. C. 630, 10 Eng. Rep. 511; Poe v. S., 10 Lea, 673; Reg. v. Flannagan, 15 Cox C. C. 403; Painter v. P., 147 Ill. 444, 35 N. E. 64; Makin v. Attorney-General, 17 Cox C. C. 704; Blackwell v. S., 29 Tex. Ap. 194, 15 S. W. 597; Goersen v. C., 99 Pa. 388, 106 Pa. 477, 51 Am. R. 534; P. v. Rogers, 71 Cal. 565. See Reg. v. Winslow, 8 Cox C. C. 397; Shaffner v. C., 72 Pa. 60, 13 Am. R. 649; Glory v. S., 13 Ark. 236.

87. Mask v. S., 32 Miss. 405; Burnett v. S., 14 Lea, 439. See Stafford v. S., 55 Ga. 591.

88. Templeton v. P., 27 Mich. 501; Dunn v. S., 2 Pike, 229, 35 Am. D. 54; P. v. Johnson, 139 N. Y. 358, 34 N. E. 920.

89. Vol. II, §§ 1216a-1262; S. v. Jones, 79 N. C. 630; Clough v. S., 7 Neb. 320; S. v. Williams, 68 N. C. 60; Aikin v. S., 35 Ala. 399; Meeks v. S., 51 Ga. 429; S. v. Shuford, 69 N. C. 486; S. v. Graham, 68 N. C. 247; Kehoe v. C., 85 Pa. 127.

90. Vol. II, §§ 1247-1254; C. v. James, 99 Mass. 438; S. v. Hinkle, 6 Iowa, 380; Dillin v. P., 8 Mich. 357; St. Louis v. S., 8 Neb. 405; Morrow v. S., 48 Ind. 432; P. v. Bodine, 1 Denio, 281; Campbell v. S., 23 Ala. 44; C. v. Hersey, 2 Allen, 173; Waybright v. S., 56 Ind. 122.

91 Vol. II, § 1110; McPherson v. S., 22 Ga. 478; S. v. Walsh, 5 Nev. 315; S. v. Brown, 63 Mo. 439; C. v. Madan, 102 Mass. 1; Johnson v. C., 9 Bush, 224; Vincent v. S., 3 Tex. Ap. 678; Jones v. S., 57 Miss. 684; Morgan v. C., 14 Bush, 106; Miller v. S., 31 Tex. Cr. 609, 37 Am. St. 836, 21 S. W. 925; Cheatham v. S., 67 Miss. 335, 19 Am. St. 310, 7 So. 204; S. v. Birdwell, 36 La. Ann. 859; S. v. Guy, 69 Mo. 430; S. v. Nugent, 71 Mo. 136; S. v. Grant, 79 Mo. 113, 49 Am. R. 218; P. v. Jones, 99 N. Y. 667, 2 N. E. 49; Schoolcraft v. P., 117 Ill. 271, 7 N. E. 649; S. v. Belton, 24 S. C. 185, 58 Am. R. 245; Richardson v. S., 133 Ala. 78, 32 So. 249; Barnes v. S., 134 Ala. 36, 32 So. 670; Crumpton v. S., 167 Ala. 4, 52 So. 605; Patterson v. S., 171 Ala. 2, 54 So. 696; Humphries v. S., 2 Ala. Ap. 1, 56 So. 72; Hurley v. Ter., 13 Ariz. 2, 108 P. 222; P. v. Riggins, 159 Cal. 113, 112 P. 862; McDaniel v. S., 100 Ga. 67, 27 S. E. 158; McCray v.

3. **His Prior Malice**—toward the deceased is always competent in proof. It need not be intense, but it is likewise admissible when it extends simply to the lower degrees of ill feeling.[92] Remoteness of time will weaken the effect of this evidence, and in some cases justify its exclusion.[93] Its office is to show the motive; and—

4. **Any Motive,**—rendering the killing probable, or explaining it against inherent improbabilities, or otherwise helpful to the jury as a circumstance, may be proved against the defendant.[94]

S., 134 Ga. 416, 68 S. E. 62; Taylor v. S., 135 Ga. 622, 70 S. E. 237; S. v. McGreevey, 17 Idaho, 453, 105 P. 1047; S. v. Demming, 79 Kan. 526, 100 P. 285; Wheeler v. S., 158 Ind. 687, 63 N. E. 975; Ewing v. Com., 33 Ky. L. 749, 111 S. W. 352; S. v. Kretschmar, 232 Mo. 29, 133 S. W. 16; S. v. Glasscock, 232 Mo. 278, 134 S. W. 549; S. v. Whitsett, 232 Mo. 511, 134 S. W. 555; S. v. Rose, 129 N. C. 575, 40 S. E. 83; S. v. Foster, 130 N. C. 666, 41 S. E. 284; Smith v. Ter., 11 Okla. 669, 69 P. 805; Brown v. S., 43 Tex. Cr. Ap. 293, 65 S. W. 529; Hunter v. S., 59 Tex. Cr. Ap. 439, 129 S. W. 125; Hardy v. Com., 110 Va. 910, 67 S. E. 522; S. v. Gates, 28 Wash. 689, 69 P. 385; S. v. Quinn, 56 Wash. 295, 105 P. 818; McUin v. U. S., 17 App. D. C. 323. Or threats against a class of which deceased was one. S. v. Sharp, 233 Mo. 269, 135 S. W. 488; Hobbs v. S., 86 Ark. 360, 111 S. W. 264.

92. Mimms v. S., 16 Ohio St. 222; Long v. S., 52 Miss. 623; S. v. Anderson, 4 Nev. 265; Stone v. S., 4 Humph. 27; S. v. Driscoll, 44 Iowa, 65; Aycock v. S., 2 Tex. Ap. 381; P. v. Kern, 61 Cal. 244; P. v. Kemmler, 119 N. Y. 580, 24 N. E. 9; Coxwell v. S., 66 Ga. 309; McMeen v. C., 114 Pa. 300, 9 A. 878; Hurley v. Ter., 13 Ariz. 2, 108 P. 222; P. v. Piercy, 11 Cal. Ap. 13, 116 P. 322; P. v. Cleminson, 250 Ill. 135, 95 N. E. 157; S. v. Lovell, 235 Mo. 343, 138 S. W. 523. Purchase and possession of fire arms by accused is relevant. S. v. Sharp, 233 Mo. 269, 135 S. W. 488.

93. Reg. v. Hagan, 12 Cox C. C. 357, 4 Eng. Rep. 606; Terrell v. C., 13 Bush. 246; S. v. Kretschmar, 232 Mo. 29, 133 S. W. 16.

94. Vol. II, § 1107; Fraser v. S., 55 Ga. 325; Howser v. C., 51 Pa. 332; St. Louis v. S., 8 Neb. 405; Templeton v. P., 27 Mich. 501; Noles v. S., 26 Ala. 31, 62 Am. D. 711; Rex v. Clewes, 4 Car. & P. 221; Stout v. P., 4 Par. Cr. 71; Dunn v. S., 2 Pike, 229, 35 Am. D. 54; Binns v. S., 57 Ind. 46, 26 Am. R. 48; Carroll v. C., 84 Pa. 107; Campbell v. C., 84 Pa. 187; Johnson v. S., 17 Ala. 618; S. v. Green, 35 Conn. 203; S. v. Hinkle, 6 Ia. 380; Coward v. S., 6 Tex. Ap. 59; Hester v. C., 85 Pa. 139; Baalam v. S., 17 Ala. 451; Kennedy v. P., 39 N. Y. 245; S. v. Johnson, 30 La. Ann. 921; S. v. Cross, 68 Iowa, 180; Marler v. S., 67 Ala. 55, 42 Am. R. 95; Turner v. S., 70 Ga.

Yet it is not indispensable to a conviction that a motive should appear.[95]

765; Nelson v. S., 61 Miss. 212; S. v. Senn, 32 S. C. 392, 11 S. E. 292; Harris v. S., 31 Tex. Cr. 411, 20 S. W. 916; Mack v. S., 48 Wis. 271, 4 N. W. 449; S. v. Kline, 54 Iowa, 183, 6 N. W. 184; McManus v. C., 91 Pa. 57; S. v. Morris, 84 N. C. 756; S. v. Cole, 63 Iowa, 695, 17 N. W. 183; Boyle v. S., 61 Wis. 440, 21 N. W. 289; Ettinger v. C., 98 Pa. 338; Johnson v. S., 24 Fla. 162, 4 So. 535; Marler v. S., 68 Ala. 580; Stricklin v. C., 83 Ky. 566; Pierson v. P., 79 N. Y. 424, 35 Am. R. 524; St. Louis v. S., 8 Neb. 405; Morrison v. S., 84 Ala. 405, 4 So. 402; S. v. Reed, 53 Kan. 767, 42 Am. St. 322, 37 P. 174; P. v. Harris, 136 N. Y. 423, 33 N. E. 65; Siebert v. P., 143 Ill. 571, 32 N. E. 431; Williams v. S., 161 Ala. 52, 50 So. 59; Phillips v. S., 161 Ala. 60, 50 So. 194; Holland v. S., 162 Ala. 5, 50 So. 215; Roberts v. S., 171 Ala. 12, 54 So. 993; P. v. Donlan, 135 Cal. 489, 67 P. 761; P. v. Muhly, 11 Cal. Ap. 129, 104 P. 466; S. v. Labry, 124 La. 748, 50 So. 700; Burley v. S., 130 Ga. 343, 60 S. E. 1006; Hoxie v. S., 114 Ga. 19, 39 S. E. 944; S. v. Kuhn, 117 Ia. 216, 90 N. W. 733; Com. v. Rivet, 205 Mass. 464, 91 N. E. 877; S. v. Stratford, 149 N. C. 483, 62 S. E. 882; Smithson v. S., 124 Tenn. 218, 137 S. W. 487; Weaver v. S., 43 Tex. Cr. App. 340, 65 S. W. 534; Baines v. S., 43 Tex. Cr. App. 490, 66 S. W. 847; Fletcher v. S. (Tex. Cr. App.), 68 S. W. 173; Harrelson v. S., 60 Tex. Cr. App. 534, 132 S. W. 783; Burton v. Com., 108 Va. 892, 62 S. E. 376; Lawson v. S., 171 Ind. 431, 84 N. E. 974; Welch v. Com., 33 Ky. L. 51, 108 S. W. 863; S. v. Page, 212 Mo. 224, 110 S. W. 1057; Shirley v. S., 144 Ala. 35, 40 So. 269; Com. v. Kennedy, 170 Mass. 18, 48 N. E. 770; P. v. Sutherland, 154 N. Y. 345, 48 N. E. 518; P. v. Gallagher, 174 N. Y. 505, 66 N. E. 1113. That the motive was to conceal a felony, Robinson v. S. (Ga.), 39 S. E. 862; or to remove deceased as an obstacle in the way of accused to marry a woman, S. v. Burton (Kan.), 66 P. 633; to secure revenge for deceased having reported defendant's unlawful conduct. S. v. Rose, 129 N. C. 575, 40 S. E. 83, may be found.

95. Pointer v. U. S., 151 U. S. 396; Poellnitz v. S., 1 Ala. Ap. 121, 55 So. 1028; Hogue v. S., 93 Ark. 316, 124 S. W. 783; P. v. Knapp, 16 Cal. Ap. 682, 117 P. 792; S. v. Rathbun, 74 Conn. 524, 51 A. 540; House v. S., 94 Miss. 107, 48 So. 3; Ashby v. S. (Tenn. 1911), 139 S. W. 872; Hedger v. S., 144 Wis. 279, 128 N. W. 80. Evidence that another had a motive to kill deceased rejected. Tatum v. S., 131 Ala. 32, 31 So. 369. Evidence that deceased had instituted or threatened to begin, or testified against accused or otherwise aided in criminal proceedings is relevant to show motive. Zipperian v. P., 33 Colo. 134, 79 P. 1018; Smith v. S., 48 Fla. 307, 37 So. 573; S. v. Goodson, 116 La. 388, 40 So. 771; S. v. Geddes, 22 Mont. 68, 55 P. 919; S. v. Martin, 47 Ore. 282, 83 P. 849; Barkman v. S., 41 Tex. Cr. 105, 52 S. W. 73; Terry v. S., 45 Tex. Cr. 264, 76 S. W. 928. Evidence that deceased and accused were com-

§ 630. The Mutual Relations—of the defendant and deceased, at and before the time of the killing, are important on the question of motive;[96] including their temper and feelings toward each other.[97] Thus, on a charge against a husband for murdering his wife, it may be shown that they quarreled,[98] or that he ill treated her,[99] or she complained of him before a magistrate as a disorderly person,[1] or he

petitors for the favors of the same woman, is competent to show motive. P. v. Cook, 148 Cal. 334, 83 P. 43; Fearson v. U. S., 10 App. D. C. 536; S. v. Reed, 50 La. Ann. 990, 24 So. 131; S. v. Bean, 77 Vt. 384, 60 A. 807. Where either husband or wife is charged with the homicide of the other, it is competent to prove illicit relations of the accused with a third party. Brunson v. S., 124 Ala. 37, 27 So. 410; Caddell v. S., 129 Ala. 57, 30 So. 76; P. v. Bowers, 1 Cal. Ap. 501, 82 P. 553; S. v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 277; S. v. Callaway, 154 Mo. 91, 55 S. W. 444; P. v. Scott, 153 N. Y. 40, 46 N. E. 1028; P. v. Montgomery, 176 N. Y. 219, 68 N. E. 258; S. v. Legg, 59 W. Va. 315, 52 S. E. 545. Evidence of illicit relations between accused and the wife of decedent is competent. Stokes v. S., 71 Ark. 212, 71 S. W. 248; P. v. Brown, 130 Cal. 591, 62 P. 1072; Tompkins v. Com., 117 Ky. 138, 25 Ky. L. 1254, 77 S. W. 712; Onidas v. S., 78 Miss. 622, 29 So. 525; S. v. Goddard, 162 Mo. 198, 62 S. W. 697; S. v. Abbatto, 64 N. J. L. 658, 47 A. 10; Com. v. Fry, 198 Pa. 379, 48 A. 257; S. v. Aughtry, 49 S. C. 285, 26 S. E. 619; S. v. Chase, 68 Vt. 405, 35 A. 336.

96. S. v. Mahly, 68 Mo. 315; Turner v. C., 86 Pa. 54, 27 Am. R. 683; Wellar v. P., 30 Mich. 16, 22; Hunter v. S., 43 Ga. 483; Rutherford v. C., 13 Bush, 608; Stephens v. P., 4 Par. Cr. 396; Commander v. S., 60 Ala. 1; P. v. Horton, 4 Mich. 67; Murphy v. P., 63 N. Y. 590; Hendrickson v. P., 6 Seld. 13, 61 Am. D. 721; S. v. Leabo, 84 Mo. 168, 54 Am. R. 91; Billingslea v. S., 68 Ala. 486; Bell v. S., 170 Ala. 16, 54 So. 116; Ray v. S., 108 Tenn. 282, 67 S. W. 553; O'Boyle v. Com., 100 Va. 785, 40 S. E. 121.

97. Haynes v. S., 17 Ga. 465; S. v. Ford, 1 Speers, 146; Breen v. P., 4 Par. Cr. 380; Haile v. S., 1 Swan (Tenn.), 248; McMillen v. S., 13 Mo. 30; P. v. Dennis, 39 Cal. 625; Pressley v. S., 166 Ala. 17, 52 So. 337; Ford v. S., 96 Ark. 582, 132 S. W. 995; P. v. White, 251 Ill. 67, 95 N. E. 1036; S. v. Tweed, 152 N. C. 843, 68 S. E. 139; Betts v. S., 60 Tex. Cr. Ap. 631, 133 S. W. 251.

98. S. v. Langford, Busbee, 436; Koerner v. S., 98 Ind. 7; Com. v. Howard, 205 Mass. 128, 91 N. E. 397; Hedger v. S., 144 Wis. 279, 128 N. W. 80.

99. S. v. Rash, 12 Ire. 382, 55 Am. D. 420; Wilson v. S., 59 Tex. Cr. Ap. 623, 129 S. W. 613. See Porter v. S., 17 Ind. 694, 91 N. E. 340.

1. P. v. Williams, 3 Par. Cr. 84. And see McCann v. P., 3 Par. Cr. 272.

thought her unfaithful to his bed.[2] A prior difficulty, yet not irrelevant particulars, between any defendant and the deceased, may be shown.[3] Again,—

2. **The Relative Strength**—of the defendant and deceased, where the other facts render it material, may be shown.[4]

VI. *Expert Testimony.*

§ 631. 1. The General Doctrine—is explained in the first volume;[5] and more appears in this one under the title "Insanity."[6] Experts are often called in homicide cases; as,—

2. **Poisons.**—The effects of different poisons, alike on the system generally and in the individual instance, applied internally or externally, may be shown by expert evidence.[7]

3. **Wounds,**—when and how made, their probably mortal nature or otherwise, how they severally contributed to the death, and whatever else of the sort is within the special

2. Fisher v. P., 23 Ill. 283, 285, 295; McCann v. P., supra. P. v. Bowen, 165 Mich. 231, 130 N. W. 706. Or that he had a paramour. P. v. Scott, 153 N. Y. 40, 46 N. E. 1028.

3. Tarver v. S., 43 Ala. 354; Pound v. S., 43 Ga. 88; McLean v. S., 16 Ala. 672. See also S. v. Watkins, 9 Conn. 47, 53, 54, 21 Am. D. 712; S. v. Green, 35 Conn. 203; Baines v. S., 43 Tex. Cr. Ap. 490, 66 S. W. 847.

4. Wellar v. P., 30 Mich. 16; Wise v. S., 2 Kan. 419, 85 Am. D. 595; S. v. Broussard, 39 La. Ann. 671, 2 So. 422; C. v. Barnacle, 134 Mass. 215, 45 Am. R. 319; Stephenson v. S., 110 Ind. 358, 59 Am. R. 216, 11 N. E. 360. See S. v. Shoultz, 25 Mo. 128, 146. Where the defendant pleads self-defense. Robinson v. S., 55 Ala. 671, 45 So. 916.

5. Vol. II, § 1179.

6. Post, §§ 683-687. And see ante, § 432c.

7. Rex v. Long, 4 Car. & P. 398; P. v. Williams, 3 Par. Cr. 84; S. v. Cook, 17 Kan. 392; Hartung v. P., 4 Par. Cr. 319; P. v. Hartung, 4 Par. Cr. 256; Stephens v. P., 4 Par. Cr. 396; S. v. Hinkle, 6 Iowa, 380; S. v. Bowman, 80 N. C. 432; Pierson v. P., 18 Hun, 239; Siebert v. P., 143 Ill. 571, 32 N. E. 431; Simons v. P., 150 Ill. 66, 36 N. E. 1019; P. v. Lee, 248 Ill. 64, 93 N. E. 321; Davis v. S. (Tex. 1908), 118 S. W. 366; S. v. Kammel, 23 S. D. 465, 122 N. W. 420; Levering v. Com., 132 Ky. 666, 117 S. W. 253.

range of medical and surgical knowledge and skill, may be in the same way explained when pertinent to the issue.[8]

4. **Pregnancy**—may be proved by experts.[9]

5. **Blood Stains,**—or stains claimed to be such, may be explained by them. And persons not experts may testify whether or not spots appeared to be from blood,[10] and whether or not the blood was fresh.[11]

6. **Cause of Death.**—An expert may say what, upon assumed facts, he deems the cause of the death.[12] But com-

8. Rumsey v. P., 19 N. Y. 41; Curry v. S., 5 Neb. 412; Wilson v. P., 4 Par. Cr. 619; Linsday v. P., 63 N. Y. 143; S. v. Morphy, 33 Iowa, 270, 11 Am. R. 122; Davis v. S., 38 Md. 15, 43; P. v. Rogers, 13 Abb., n. s., 370; C. v. Piper, 120 Mass. 185; Rosenbaum v. S., 33 Ala. 354; S. v. Knight, 43 Me. 11; Henry v. S., 11 Humph. 224; P. v. Kerrains, 1 Thomp. & C. 333; Saunders v. S., 37 Tex. 710; S. v. Harris, 63 N. C. 1; Kennedy v. P., 39 N. Y. 245; Wendell v. Troy, 39 Barb. 329; Fort v. Brown, 46 Barb. 366; Anthony v. Smith, 4 Bosw. 503; Wood v. S., 31 Tex. Cr. 571, 21 S. W. 602; Weeks v. S., 79 Ga. 36, 3 S. E. 323; P. v. Hare, 57 Mich. 505, 24 N. W. 843; S. v. Cross, 68 Iowa, 180, 26 N. W. 62; Hopt v. Utah, 120 U. S. 430; Territory v. Egan, 3 Dak. 119; Everett v. S., 62 Ga. 65; P. v. Fish, 125 N. Y. 136, 26 N. E. 319; Batten v. S., 80 Ind. 394; Williams v. S., 30 Ohio Cir. Ct. R. 342; Roe v. S., 55 Tex. Cr. 128, 115 S. W. 593; Pollock v. S., 136 Wis. 136, 116 N. W. 851; Burkett v. S., 154 Ala. 19, 45 So. 682; Harper v. S., 129 Ga. 770, 59 S. E. 792; S. v. Rutledge, 135 Iowa, 581, 113 N. W. 461; Fay v. S., 52 Tex. Cr. 185, 107 S. W. 55.

9. S. v. Smith, 32 Me. 369, 54 Am. D. 578.

10. P. v. Gonzalez, 35 N. Y. 49; C. v. Sturtivant, 117 Mass. 122, 19 Am. R. 401; P. v. Bell, 49 Cal. 485; S. v. Knight, 43 Me. 11; Rickerson v. S., 78 Ga. 15, 1 S. E. 178; S. v. Robinson, 117 Mo. 649, 23 S. W. 1066; Dillard v. S., 58 Miss. 368; Greenfield v. P., 85 N. Y. 75, 39 Am. R. 636; Diaz v. S. (Tex. 1911), 137 S. W. 377; Davis v. S., 126 Ala. 44, 28 So. 617; Walker v. S., 139 Ala. 56, 35 So. 1011; Hinshaw v. S., 147 Ind. 334, 47 N. E. 157. Blood stained clothing received. Rollings v. S., 160 Ala. 82, 49 So. 329.

11. P. v. Loui Tung, 90 Cal. 377, 27 P. 295.

12. S. v. Bowman, 78 N. C. 509; Shelton v. S., 34 Tex. 662; S. v. Smith, 32 Me. 369; C. v. Livingston, 14 Grat. 592; S. v. Jones, 68 N. C. 443; S. v. Bailey, 4 La. Ann. 376; Carthaus v. S., 78 Wis. 560; Ebos v. S., 34 Ark. 520; Boyle v. S., 61 Wis. 440, 21 N. W. 289; S. v. Clark, 15 S. C. 403. See S. v. Morgan, 95 N. C. 641; Williams v. S., 64 Md. 384, 1 A. 887; P. v. Barker, 60 Mich. 277, 1 Am. St. 501, 27 N. W. 539; S. v. Kammel, 23 S. D. 465, 122 N. W. 420; Morris v. Com., 27 Ky. L. 145, 84 S. W. 560.

monly or often the jury may be sufficiently informed thereof without this help.[13]

7. **One not an Expert**—may testify to what is within common observation;[14] as, that an injured person's health is failing,[15] that a piece of paper has the appearance of wadding from a gun,[16] that the defendant manifested anger.[17]

§ 632. **An Expert**—is any person specially versed in the subject under inquiry.[18] Oftenest, in homicide cases, he is a practicing physician or surgeon; but, on many questions, chemists are equally, and, on some, more, competent.[19] And in these cases there may be other experts; as, one accustomed to prepare corpses for burial,[20] one familiar with fire-arms,[21] one experienced in comparing and judging of handwritings.[22]

V. *Other Questions of Evidence.*

§ 633. 1. **The Remaining Questions**—of evidence in homicide are chiefly such as pertain equally to all offenses and civil causes; not therefore for any full treatment here.

13. Stafford v. S., 55 Ga. 591.

14. Hubbard v. S., 72 Ala. 164; Alabama Great South. Rld. v. Yarborough, 83 Ala. 238, 3 So. 447; S. v. Stackhouse, 24 Kan. 445; Wynne v. S., 56 Ga. 113. See Rash v. S., 61 Ala. 89.

15. Louisville, etc. Ry. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

16. P. v. Manke, 78 N. Y. 611; Manke v. P., 17 Hun, 410.

17. S. v. Shelton, 64 Iowa, 333, 20 N. W. 459; P. v. Haxer, 144 Mich. 575, 108 N. W. 90; Perry v. S., 110 Ga. 234, 36 S. E. 781; Scott v. S., 49 Tex. Cr. 519, 93 S. W. 740.

18. Vol. II, § 1179; Tullis v. Kidd, 12 Ala. 648; Tatum v. Mohr, 21 Ark. 349; Rowell v. Lowell, 11 Gray, 429; Emerson v. Lowell Gas Light Co., 6 Allen, 146, 83 Am. D. 621; New Orleans, etc. Rld. v. Allbritton, 38 Miss. 242, 75 Am. D. 98; Lush v. McDaniel, 13 Ire. 485, 57 Am. D. 566; S. v. Terrell, 12 Rich. 321; Bierce v. Stocking, 11 Gray, 174; Rice v. S., 54 Tex. Cr. 149, 112 S. W. 299.

19. Hartung v. P., 4 Par. Cr. 319; S. v. Cook, 17 Kan. 392; Reg. v. Holden, 8 Car. & P. 606; S. v. Hinkle, 6 Iowa, 380; Johnson v. S., 20 Tex. Ap. 178; Soquet v. S., 72 Wis. 659, 40 N. W. 391; Mitchell v. S., 58 Ala. 417; S. v. Cole, 63 Iowa, 695, 17 N. W. 183.

20. S. v. Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

21. Meyers v. S., 14 Tex. Ap. 35; S. v. Jones, 41 Kan. 309, 21 P. 265.

22. S. v. DeGraff, 113 N. C. 688, 18 S. E. 507.

2. **Res Gestae.**—Not only in circumstances stated in prior elucidations,[23] but in others, it is important, where so much depends on circumstantial evidence as in most homicide cases, to lay the whole of the transaction before the jury,[24] together with all helpful exhibits.[25] Even the condition of the ground and the surroundings may in general be properly shown.[26] So may be wounds not mentioned in the indictment.[27] And—

3. **What is done or said by a Third Person,**—and his feelings toward the parties, will be competent in some circumstances, not in others,—questions depending on the general rules of evidence.[28]

23. Vol. II, §§ 1083-1087; ante, §§ 625-627.

24. C. v. Sturtivant, 117 Mass. 122, 19 Am. R. 401; O'Mara v. C., 75 Pa. 424; S. v. Testerman, 68 Mo. 408; Fernandez v. S., 4 Tex. Ap. 419; Brown v. C., 76 Pa. 319; P. v. Murphy, 45 Cal. 137; Hawkins v. S., 25 Ga. 207, 71 Am. D. 166; Hofler v. S., 16 Ark. 534; P. v. Swenson, 49 Cal. 388; Harris v. S., 53 Ga. 640; Kehoe v. C., 85 Pa. 127; P. v. Shea, 8 Cal. 538; Aaron v. S., 31 Ga. 167; Gatlin v. S., 5 Tex. Ap. 531; Ruloff v. P., 45 N. Y. 213; Wynne v. S., 56 Ga. 113; C. v. Woodward, 102 Mass. 155; Russell v. C., 78 Va. 400; C. v. Abbott, 130 Mass. 472; Jamison v. P., 145 Ill. 357, 34 N. E. 486; Lewis v. S., 29 Tex. Ap. 201, 25 Am. St. 720, 15 S. W. 642; P. v. Hawes, 98 Cal. 648, 33 P. 791; Grigsby v. S., 4 Bax. 19; King v. S., 65 Miss. 576, 5 So. 97; Jeffries v. S., 9 Tex. Ap. 598; Hodge v. S., 98 Ala. 10, 39 Am. St. 17, 13 So. 385; P. v. Pallister, 138 N. Y. 601, 33 N. E. 741; P. v. Parker, 137 N. Y. 535, 32 N. E. 1013; Leeper v. S., 29 Tex. Ap. 63, 14 S. W. 398; S. v. Stewart, 156 N. C. 636, 72 S. E. 193.

25. Thomas v. S., 67 Ga. 460; S. v. Stair, 87 Mo. 268, 56 Am. R. 449; Hodge v. S., 97 Ala. 37, 38 Am. St. 145, 12 So. 164; Davidson v. S., 135 Ind. 254, 34 N. E. 972; P. v. O'Brien, 78 Cal. 41, 20 P. 359; King v. S., 13 Tex. Ap. 277; Hart v. S., 15 Tex. Ap. 202, 49 Am. R. 188.

26. Caw v. P., 3 Neb. 357; Reg. v. Leggett, 8 Car. & P. 191; P. v. Johnson, 140 N Y. 350, 35 N. E. 604; Watkins v. S., 89 Ala. 82, 8 So. 134.

27. S. v. Hoyt, 13 Minn. 132.

28. Boothe v. S., 4 Tex. Ap. 202; Campbell v. S., 23 Ala. 44; Hackett v. P., 54 Barb. 370; Crawford v. S., 12 Ga. 142; Crookham v. S., 5 W. Va. 510; Rufer v. S., 25 Ohio St. 464; S. v. Davis, 77 N. C. 483; Mershon v. S., 51 Ind. 14; Davis v. S., 3 Tex. Ap. 91; Newcomb v. S., 37 Miss. 383; Walrath v. S., 8 Neb. 80; Banks v. S., 72 Ala. 522; Walker v. S., 6 Tex. Ap. 576; S. v. Johnson, 31 La. Ann. 368; Alexander v. U. S., 138 U. S. 353; S. v. Lambert, 93 N. C. 618.

4. **That a Third Person,**—in no wise connected with the defendant,[29] committed the homicide is competent.[30]

5. **That Suicide,**—not murder, caused the death is a frequent defense. Hence when it is, a suicidal disposition may be shown.[31] Or, in proper circumstances, a declaration by the deceased of his intention to commit self-murder is admissible.[32]

§ 634. **Drunkenness**—of the defendant may be testified to under circumstances and with an effect explained in another connection.[33]

§ 635. **A Prior Conviction for Assault,**—when afterward the injured person dies of the wound within a year and a day, we have seen is not a bar to the indictment for the homicide.[34] Yet on a trial for the latter, the record of the former conviction is competent evidence of the fact thereof,[35] and is conclusive of the unjustifiable character of the battery.[36]

29. S. v. Jacobs, 107 N. C. 873, 12 S. E. 248.

30. S. v. Pritchett, 106 N. C. 667, 11 S. E. 357; Pace v. Com. (Ky.), 37 S. W. 552; Pace v. S. (Tex. Cr. Ap. 1911), 135 S. W. 379.

31. Boyd v. S., 14 Lea, 161. Nonexpert evidence as to manner supposed suicide accomplished excluded. Redd v. S., 63 Ark. 457, 40 S. W. 374. Where accused alleged that deceased had committed suicide by poison which he had sent himself by post it is proper to show deceased was erratic, wrote letters to himself and could write several kinds of handwriting. P. v. Wilson, 14 Cal. Ap. 515, 112 P. 579; Smith v. S., 61 Neb. 296, 85 N. W. 49.

32. C. v. Trefethen, 157 Mass. 180, 31 N. E. 961. Compare with Siebert v. P., 143 Ill. 571, 32 N. E. 431. See C. v. Felch, 132 Mass. 22; S. v. Lentz, 45 Minn. 177; Nordan v. S., 143 Ala. 13, 39 So. 406; S. v. Marsh, 70 Vt. 288, 40 A. 836. Contra. S. v. Bauerle, 145 Mo. 1, 46 S. W. 609.

33. New Crim. Law, I, §§ 397-416; S. v. White, 14 Kan. 538; Smith v. S., 4 Neb. 277; Pirtle v. S., 9 Humph. 663; S. v. Tatro, 50 Vt. 483; Cluck v. S., 40 Ind. 263; Achey v. S., 64 Ind. 56; McGinnis v. C., 102 Pa. 66; Armor v. S., 63 Ala. 173; C. v. Cloonen, 151 Pa. 605, 25 A. 145; Com. v. Parsons, 195 Mass. 560, 81 N. E. 29; Com. v. Eyler, 217 Pa. 512, 66 A. 746; Gustavenson v. S., 10 Wyo. 300, 68 P. 1006.

34. New Crim. Law, I, § 1059.

35. C. v. McPike, 3 Cush. 181, 50 Am. D. 727.

36. C. v. Evans, 101 Mass. 25. Compare with Reg. v. Morris (Law Rep.), 1 C. C. 90, 10 Cox C. C. 480.

§ 636. The Name of the Deceased,—we have seen, must be proved as laid,[37] and we have seen something of the evidence.[38] In one case, he was shown to have been at an inn three days. The innkeeper asked him his name, and he made answer; then letters came directed to the name thus given, and he received them; and it was ruled that the innkeeper might be permitted to state what this name was. "I think," said Patteson, J. "it is evidence to show the name by which he was usually known."[39]

§ 637. The Combined Evidence—must cover the whole case,[40] and be adequate in general and as to all the parts.[41]

37. Vol. II, §§ 488 (3), 681-689b.

38. Ante, §§ 506-511; Rutherford v. S., 11 Lea, 31.

39. Rex v. Timmins, 7 Car. & P. 499.

40. Vol. II, §§ 1052-1055.

41. Lindsay v. P., 63 N. Y. 143; Reg. v. Hopkins, 8 Car. & P. 591; Wilson v. S., 43 Tex. 472; Clough v. S., 7 Neb. 320; Weeden v. S., 41 Tex. 84; Garrett v. S., 41 Tex. 530; Lilley v. S., 41 Tex. 439; Marshall v. S., 5 Tex. Ap. 273; Cox v. S., 5 Tex. Ap. 493; Powell v. S., 8 Tex. Ap. 630; Green v. C., 83 Pa. 75; Williams v. S., 3 Tex. Ap. 123; Lopez v. S., 2 Tex. Ap. 204; P. v. Ah Kong, 49 Cal. 6; P. v. Shay, 4 Par. Cr. 344; Kelsoe v. S., 47 Ala. 573; Stiles v. S., 57 Ga. 183; P. v. San Martin, 2 Cal. 484; Monroe v. S., 23 Tex. 210, 76 Am. D. 58; P. v. Hartung, 4 Par. Cr. 256; Treadwell v. S., 16 Tex. Ap. 560. As to evidence of cartridges or cartridge shells in possession of accused and also at scene of crime. S. v. Laudano, 74 Conn. 638, 51 A. 960; S. v. Dunn, 116 Ia. 219, 89 N. W. 984; S. v. Gray, 116 Ia. 231, 89 N. W. 987.

CHAPTER CXXX.

HOMICIDE, AS TO QUESTIONS OF PRACTICE.

Consult—the places cited introducing c. 31; also the chapters on each particular topic in Vols. I and II.

§ 638. 1. **In the First Volume**—the practice is so fully considered in its larger aspects that little remains for this place.

2. **The County**—or other locality wherein the indictment is to be brought, and the allegations and proof of it, are in that volume and in "New Criminal Law" considered both as to the general doctrine, and in a measure as to homicide in particular.[42] Evidence that the defendant and the deceased were in the evening seen together going from one county toward another, where the dead body was found, was held to show venue in the latter.[43]

§ 638 a. **The Charge to the Jury**—should follow the rules stated in the first volume.[44] Thus, it should accurately give the law of whatever degree of the offense the evidence tends to prove, but not of other degrees.[45] And in

42. Vol. I, Z 45 et seq., 360 et seq.; New Crim. Law, I, §§ 110-117; Rex v. Helsham, 4 Car. & P. 394; Rex v. Sawyer, Russ. & Ry. 294; U. S. v. Imbert, 4 Wash. C. C. 702; S. v. Dunkley, 3 Ire. 116; Rex v. Depardo, 1 Taunt. 26, Russ. & Ry. 134; C. v. Linton, 2 Va. Cas. 205; Reg. v. Grand Junction Ry., 3 Per. & D. 57, note, 11 A. & E. 128, note; Reg. v. Azzopardi, 1 Car. & K. 203, 2 Moody, 288; Riley v. S., 9 Humph. 646; Bauson v. Offley, 3 Salk. 38; Stoughton v. S., 13 Sm. & M. 255, Nash v. S., 2 Greene (Iowa), 286; C. v. Parker, 2 Pick. 550; Dula v. S., 8 Yerg. 511; Rex v. De Mattos, 7 Car. & P. 458; U. S. v. Magill, 1 Wash. C. C. 463; s. c. nom. U. S. v. McGill, 4 Dall. 426; Reg. v. Lewis, Dears. & B. 182, 7 Cox, C. C. 277; Rex v. Coombes, 1 Leach, 388, 1 East, P. C. 367; Robbins v. S., 8 Ohio St. 131; U. S. v. Demarchi, 5 Blatch. 84; S. v. Testerman, 68 Mo. 408.

43. Beavers v. S., 58 Ind. 530. And see Riggs v. S., 30 Miss. 635.

44. Vol. II, §§ 976-982a.

45. Vol. II, § 980 (2); Hodges v. S., 3 Tex. Ap. 470; S. v. Green, 66 Mo. 631; S. v. Wieners, 66 Mo. 13;

other particulars it should state, and correctly, all the law applicable to the individual case, as appearing in the allegations and proofs; but none which, though abstractly correct, is not applicable.[46] The charge need not extend to

Futch v. S., 90 Ga. 472, 16 S. E. 102; P. v. Palmer, 96 Mich. 580, 55 N. W. 994; S. v. Lewis, 118 Mo. 79, 23 S. W. 1082; P. v. Lee Gam, 69 Cal. 552; S. v. Simms, 71 Mo. 538; Brownell v. P., 38 Mich. 732; Clark v. C., 123 Pa. 555, 16 A. 795; C. v. Crossmire, 156 Pa. 304, 27 A. 40; Lewis v. S., 90 Ga. 95, 16 S. E. 697; Jackson v. S., 88 Ga. 784, 15 S. E. 677; S. v. Miller, 112 N. C. 878; McKenna v. P., 81 N. Y. 360. But see Jones v. S., 29 Ga. 594; Pinkerton v. S., 146 Ala. 684, 40 So. 224; Thomas v. S., 150 Ala. 31, 43 So. 371; Fowler v. S., 155 Ala. 21, 45 So. 913; Jarvis v. S., 70 Ark. 613, 67 S. W. 76; Dow v. S., 77 Ark. 464, 92 S. W. 28; Bradshaw v. S., 95 Ark. 409, 129 S. W. 811; Demato v. P., 49 Colo. 147, 111 P. 703; Moore v. S., 59 Fla. 23, 52 So. 971; Fails v. S., 60 Fla. 8, 53 So. 612; McBeth v. S., 122 Ga. 737, 50 S. E. 931; Garland v. S., 124 Ga. 832, 53 S. E. 314; Dawson v. S., 130 Ga. 349, 60 S. E. 851; Strickland v. S., 133 Ga. 76, 65 S. E. 148; Westbrook v. S., 133 Ga. 578, 66 S. E. 788; Gadsden v. S., 134 Ga. 785, 68 S. E. 497; S. v. Shepherd, 129 Ia. 705, 106 N. W. 190; Mullins v. Com., 28 Ky. L. 2433, 67 S. W. 824; Burns v. Com., 136 Ky. 468, 124 S. W. 409; May v. S., 89 Miss. 291, 42 So. 164; S. v. Hall, 168 Mo. 475, 68 S. W. 344; S. v. Niehaus, 188 Mo. 304, 87 S. W. 473; S. v. Clay, 201 Mo. 679, 100 S. W. 439; S. v. Heath, 221 Mo. 565, 121 S. W. 140; S. v. Myers, 221 Mo. 598, 121 S. W. 131; S. v. Rumfelt, 228 Mo. 443, 128 S. W. 737; S. v. Herrmann, 77 N. J. L. 534, 76 A. 1086; Ter. v. Kimmick, 15 N. M. 178, 106 P. 381; P. v. DeGarmo, 76 N. Y. S. 477, 73 App. Div. 46; S. v. Foster, 130 N. C. 666, 41 S. E. 284; Com. v. LeGrange, 227 Pa. 368, 76 A. 63; Powers v. S., 117 Tenn. 363, 97 S. W. 815; Salinas v. S. (Tex. Cr. App), 102 S. W. 116; Crowell v. S., 56 Tex. Cr. Ap. 480, 120 S. W. 897; King v. S. (Tex. Cr. Ap. 1909), 123 S. W. 135; Dougherty v. S., 59 Tex. Cr. Ap. 464, 128 S. W. 398; Roquemore v. S., 59 Tex. Cr. Ap. 568, 129 S. W. 1120; Jennings v. S., 60 Tex. Cr. Ap. 421, 132 S. W. 473.

46. Ante, § 604 (1); Lister v. S., 3 Tex. Ap. 17; Gladden v. S., 12 Fla. 562; S. v. Jones, 79 N. C. 630; Williams v. S., 3 Tex. Ap. 316; Hodges v. S., 3 Tex. Ap. 470; Stuart v. S., 1 Bax. 178; P. v. Harris, 95 Mich. 87, 54 N. W. 648; Warren v. S., 31 Tex. Cr. 573, 21 S. W. 680; Calton v. Utah, 130 U. S. 83; McLaughlin v. S., 10 Tex. Ap. 340; P. v. Macard, 73 Mich. 15, 40 N. W. 784; Teague v. S., 144 Ala. 42, 40 So 312; Fleming v. S., 150 Ala. 19, 43 So. 219; Holland v. S., 162 Ala. 5, 50 So. 215; S. v. Bailey, 79 Conn. 589, 65 A. 951; Farmer v. Com., 28 Ky. L. 1168, 91 S. W. 682; Burns v. Com., 136 Ky. 468, 124 S. W. 409; S. v. Brown, 188 Mo. 451, 87 S. W. 519; S. v. Zorn, 202 Mo. 12, 100 S. W. 591; S. v. Dunn, 221 Mo. 530, 120 S. W. 1179; S. v. Young, 67 N. J. L. 228, 51 A. 939; S. v. Williams, 76 S. C. 135, 56

what is presumed to be known equally to the jury and the court.[47]

§ 639. *The Verdict*:—

1. **In the First Volume**—the general law of the verdict is considered.[48] And—

2. **In First and Second Degrees**—of murder, we saw in a chapter just back how it should be.[49]

3. **On a Charge of Murder,**—the verdict may be for manslaughter.[50] If the murder indictment sets out, as is common, assault and battery, the verdict may be only for either one of these;[51] except where prevails the common law rule that there can be no conviction of misdemeanor on an indictment for felony.[52]

§ 640. **Simply "Guilty"**—convicts the defendant of the highest degree alleged; for example, of murder.[53] It is the same of "Guilty of the murder of B."[54] Where there are more defendants than one, the verdict must, to convict one only, specify which one.[55]

§ 641. **"Guilty of Manslaughter"**—is probably a good verdict therefor on a murder indictment;[56] yet a better

S. E. 783; S. v. Phillips, 59 Wash. 252, 109 P. 1047; S. v. Gravely, 66 W. Va. 375, 66 S. E. 503.

47. Flournoy v. S., 16 Tex. 31, 32.

48. Vol. II, §§ 1000a-1016.

49. Ante, §§ 590-596.

50. New Crim. Law, I, § 794; Vol. II, § 1009; S. v. Fleming, 2 Strob. 464; Roy v. S., 2 Kan. 405; Evans v. S., 33 Ga. 1; P. v. Machuca, 158 Cal. 62, 109 P. 886; P. v. Herges, 14 Cal. Ap. 273, 111 P. 624; Lynn v. P., 170 Ill. 527, 48 N. E. 964; P. v. Darragh, 126 N. Y. S. 522; Contra, Com. v. LeGrange, 227 Pa. 368, 76 A. 63.

51. New Crim. Law, I, § 803.

52. New Crim. Law, I, §§ 804-808.

53. P. v. March, 6 Cal. 543; Vol. I, § 1005a (2). See Revel v. S., 26 Ga. 275; Frolich v. S., 11 Ind. 213, 215; Wilson v. S., 18 Ohio, 143. Contra by statute. S. v. May, 62 W. Va. 129, 57 S. E. 566. If statute requires jury to find the degree, a verdict of guilty, not stating the degree is void. Lancaster v. S., 71 Ark. 100, 71 S. W. 251; Mahany v. P., 31 Colo. 365, 73 P. 26; S. v. Heth, 60 Kan. 560, 57 P. 108; Russell v. S., 66 Neb. 497, 92 N. W. 751; S. v. Hubbard, 20 S. D. 18, 104 N. W. 1120.

54. McGuffie v. S., 17 Ga. 497. See S. v. Upton, 1 Dev. 513.

55. S. v. Bradley, 9 Rich. 168.

56. Jordan v. S., 22 Ga. 545; Dias v. S., 7 Blackf. 20, 39 Am. D. 448. And see S. v. Raines, 3 Mc-

form would be, "Not guilty of the malice aforethought alleged, but guilty of the residue of the indictment."[57]

§ 642. 1. The Verdict is good—if its meaning can be reasonably ascertained, and it can be legally carried into effect; otherwise, not.[58]

2. **A Verdict contrary to Instructions,**—for a less degree of the offense than the evidence proves, must be received and carried out. A new trial cannot be ordered.[59]

Cord, 533; S. v. Waters, 39 Me. 54; Huntington v. Sup. Ct. of City & Co. of San Francisco, 5 Cal. Ap. 288, 90 P. 141.

57. Vol. II, §§ 1010, 1011.

58. For illustrations, see S. v. Waters, 39 Me. 54; Wall v. S., 23 Ind. 150; Beckwith v. P., 26 Ill. 500; S. v. White, 45 Iowa, 325; Morman v. S., 24 Miss. 54; Short v. S., 7 Yerg. 510; Camp v. S., 25 Ga. 689; S. v. Posey, 4 Strob. 103, 141; Donnelly v. S., 2 Dutcher, 463, 601; Noles v. S., 26 Ala. 31, 62 Am. D. 711; Harrall v. S., 26 Ala. 52; Noles v. S., 24 Ala. 672; Stevens v. S., 133 Ala. 28, 32 So. 270; Durrett v. S., 133 Ala. 119, 32 So. 234; Bennett v. S., 95 Ark. 100, 128 S. W. 851; S. v. Henry, 51 W. Va. 283, 41 S. E. 439.

59. Jordan v. S., 22 Ga. 545; S. v. Green, 229 Mo. 642, 129 S. W. 700; Bass v. S., 59 Tex. Cr. Ap. 186, 127 S. W. 1020; S. v. Phillips, 59 Wash. 252, 109 P. 1047.

CHAPTER CXXXI.

HOMICIDE, AS TO THE ATTEMPT.

Consult—The places cited introducing c. 31; and the chapters on ATTEMPT, and ASSAULT AND BATTERY. Also Dir. & F., §§ 549-559.

§ 643. 1. **In the Two Chapters**—just referred to there is much that would be equally appropriate here. Remaining for this chapter,—

2. **How Chapter divided.**—We shall consider, I. The Attempt by Poisoning; II. The Attempt by Violence.

I. *The Attempt by Poisoning.*

§ 644. 1. **On a Statute,**—if, as commonly, the procedure is, the particular statutory words, and their construed meaning, should be carefully considered alike as to the form of the indictment and the proofs. Thus, the English 7 Will. 4 & 1 Vict. c. 85, § 2 & 3 (now repealed, and substantially re-enacted in 24 & 25 Vict. c. 100, § 11, 14), made it, in § 2, an offense to "administer" to one "any poison or other destructive thing," "with intent to commit murder;" and in § 3, to "attempt to administer" the same, with the like intent. Here the indictment and proofs were required to be different, according to the section on which the prosecution was founded. A New York statute is the same as the above § 2, yet adding, what is not in the above, "and which shall have been actually taken by such" person.[60]

2. **The Indictment,**—on the latter statute, should cover these words; yet one on the Massachusetts statute, which

60. La Beau v. P., 6 Par. Cr. 371.

omits them, more nearly following the English,[61] need not.

§ 645. 1. In Form,—the indictment on a statute like the above § 2 may charge, for example, that on, etc., at, etc., the defendant "feloniously [in a State where the offense is felony] and unlawfully did administer to one X a large quantity of a certain deadly poison[62] called white arsenic, to wit, two drachms of the said white arsenic,[63] with intent then and there and thereby feloniously, wilfully, and of his malice aforethought the said X to kill and murder."[64] Under a statute like that in New York, the distinguishing words above stated should be added to these.[65]

2. **If the Person to be Poisoned** —is in doubt, Archbold recommends an added count "stating the intent to be to 'commit murder' generally."[66] But it is believed that courts particular as to forms would not accept this.[67] It is safer to say, "with intent to murder some person to the jurors unknown."

3. **"Administer."**—Though the indictment, on a statute like the above English one, need not aver that the poison was taken into the stomach,[68] the proofs must show it so, at least the contrary must not appear,—its passing into the stomach being inseparable from the act of administering."[69]

61. C. v. Galavan, 9 Allen, 271; C. v. Bearse, 108 Mass. 487.

62. Shackleford v. S., 79 Ala. 26.

63. Ante, § 553; Dir. & F., §§ 139-141, 213, 533, 714.

64. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 438, (19th Ed.) 706; C. v. Bearse, 108 Mass. 487; C. v. Galavan, 9 Allen, 271; Sarah v. S., 28 Miss. 267, 61 Am. D. 544; C. v. Hobbs, 140 Mass. 443, 5 N. E. 158. And see Madden v. S., 1 Kan. 340; Johnson v. S., 90 Ga. 441, 16 S. E. 92.

65. La Beau v. P., 6 Par. Cr. 371. And see P. v. Hartung, 4 Par. Cr. 256. Compare this form with Dir. & F., § 558.

66. Archb. Crim. Pl. & Ev. (19th Ed.) 706, referring to Reg. v. Ryan, 2 Moody & R. 213. And see subsequent note.

67. Ante, §§ 77 (4), 82.

68. Par. 1 of this section.

69. Stat. Crimes, § 225; Rex v. Cadman, 1 Moody, 114, Car. Crim. Law (3d Ed.) 237; Rex v. Harley, 4 Car. & P. 369, 371; Sumpter v. S., 11 Fla. 247. In the above case of Rex v. Harley, Park, J. speaking

4. **The Hand of the Defendant**—need not deliver the poison; it is the same if left for the victim to find and take, or pointed out to him, or transmitted through the agency of another,[70] or received and swallowed by a person other than the one for whom it was meant.[71] Nor is it material whether or not the person taking it acted voluntarily, or was induced by deception, or compelled by force.[72]

5. **Other Instances**—of administering to the same person, at other times, are in the evidence admissible to the question of intent.[73]

§ **646.** 1. **Doing or Attempting.**—Where the statutory words are "attempt to administer," instead of "administer,"[74] an approved English form substitutes in the allegation the former words for the latter; not specifying in what the attempt consisted.[75] Probably there is no English

of Rex v. Cadman as reported by Moody, said: "I am inclined to think that some mistake has crept into that report. It is there stated that the judges thought the swallowing of the poison not essential; but my recollection is that the judges held just the contrary." And Carrington's report accords with this recollection; so does Greaves's statement that a pardon was recommended, which otherwise would not have been. 1 Russ. Crimes (5th Eng. Ed.) 924, note.

70. Rex v. Harley, 4 Car. & P. 369; Reg. v. Michael, 2 Moody, 120, 9 Car. & P. 356; Reg. v. Dale, 6 Cox, C. C. 14.

71. Reg. v. Michael, supra; Rex v. Lewis, 6 Car. & P. 161. "In Reg. v. Ryan, 2 Moody & R. 213, however, Parke, B. after consulting Alderson, B. expressed an opinion that an indictment for causing poison to be taken by A, with intent to murder A, was not sustained by evidence showing that the poison, though taken by A, was intended for another person; and doubted the propriety of the decision in Rex v. Lewis; and accordingly, after the defendant had been convicted, he directed a fresh indictment to be preferred, charging the intent to be generally 'to commit murder;' upon which the defendant was again tried, convicted, and sentenced. See, however, Reg. v. Smith, Dears. 559." Archb. Crim. Pl. & Ev. (19th Ed.) 706, 707. This question, it is seen, relates only to the person to be named as the intended victim. See New Crim. Law, II, § 741 (4). Practically, the pleader will charge it both ways.

72. Blackburn v. S., 23 Ohio St. 146, 150, 162.

73. Rex v. Mogg, 4 Car. & P. 364.

74. Ante, § 644.

75. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 440, (19th Ed.) 708.

adjudication directly in point. But we have seen that in apparently analogous cases the act wherein the attempt consisted should in principle, and by the better-considered of our American decisions, be stated.[76]

2. **An Assault**—is no part of this offense, and need not be alleged.[77]

§ 647. **Do or Cause.**—Under the statutory words "administer *or* cause to be administered," the allegation may be "administered *and* (not *or*[78]) caused to be administered," without rendering the count double.[79] But the neater way is to frame the count on one only of the alternative phrases.[80]

§ 648. 1. **Poisonous—Name.**—If, on an indictment which avers the effect of the poison,[81] we assume it not necessary to state the poisonous quality of the thing, still in one for an attempt to commit murder by poison where the allegation is silent as to the effect, such poisonous quality, showing a real or apparent danger,[82] must appear; simply to state the name of the drug does not suffice.[83] But—

2. **Defendant's Knowledge.**—It need not be charged that the defendant knew the thing to be poisonous: so the Massachusetts court held,[84] and such we have seen to be the English form.[85] Yet this averment was in North Carolina adjudged necessary, on the ground that in the absence of such knowledge there would be no offense.[86] The answer to which reasoning is, in principle, that while the

76. Ante, §§ 87-92; post, § 651. In Tennessee, an indictment in the English form was sustained; but the objection here stated was not made, and it does not appear to have occurred to the court. Collins v. S., 3 Heisk. 14.

77. Ante, § 554 (1); Garnet v. S., 1 Tex. Ap. 605, 28 Am. R. 425; Collins v. S., supra.

78. Vol. I, § 436; Vol. II, §§ 484 (2), 585 (3), 620 (2).

79. Ben v. S., 22 Ala. 9, 58 Am. D. 234.

80. Ante, § 438.

81. Yet, for form, see ante, §§ 553-556.

82. New Crim. Law, I, § 738 et seq.

83. Anthony v. S., 29 Ala. 27, 29; Rex v. Powles, 4 Car. & P. 571.

84. C. v. Galavan, 9 Allen, 271.

85. Ante, § 645 (1).

86. S. v. Yarborough, 77 N. C. 524.

premise is true, the forbidden and injurious act set out carries with it the doer's criminal intent *prima facie;* and if he would excuse himself because of ignorance, he must bring it forward in defense.[87]

§ 649. **Wife as Witness.**—Though this is not a case of personal violence, the same reason seems to apply;[88] and the Irish court held that the wife may be a witness against her husband charged with giving her poison to take her life.[89]

§ 650. 1. **Variance.**—Probably the rule in murder by poison, permitting a different kind to be proved from that charged,[90] applies also to these cases. So that on an Irish indictment for administering sugar of lead mixed with flour, where the jury in returning their verdict of guilty told the court they could not determine what was the poisonous substance in the mixture, the conviction was adjudged to be right.[91] Still,—

2. **A Chemical Analysis**—of the contents of the stomach is, if it may be had, practically in all cases desirable.[92]

II. *The Attempt by Violence.*

§ 651. 1. **The Principles**—governing the indictment are explained in the title "Attempt."[93] As to particulars,—

2. **Attempt to Murder by Drowning.**—Under the English 7 Will. 4 & 1 Vict. c. 85, § 3 (re-enacted in 24 & 25 Vict. c. 100, § 14), to punish the "attempt to drown, suffocate, or strangle any person, with intent to commit the crime of murder," an approved form of the indictment avers that on, etc., at, etc., the defendant, A "feloniously and unlawfully did take one X into both the hands of him the said A, and then and there feloniously and unlawfully

87. Vol. II, §§ 521-525; ante, § 538 (1).

88. Ante, § 69.

89. Rex v. Wasson, 1 Crawf. & Dix C. C. 197.

90. Ante, § 555.

91. Rex v. Shannon, Jebb, 209. See Joe v. S., 6 Fla. 591, 65 Am. D. 579.

92. Joe v. S., supra.

93. Ante, §§ 77-93.

did cast, throw, and push the said X into a certain pond wherein there was a great quantity of water, and did thereby then and there feloniously and unlawfully attempt the said X to drown and suffocate, with intent then and there and thereby feloniously, wilfully, and of his malice aforethought the said X to kill and murder.''[94]

§ 652. Shooting to Murder.—Under another clause of the same statute, forbidding one to ''shoot at any person,'' with the like intent, the indictment might charge that on, etc., at, etc., A, the defendant, ''a certain gun, then and there loaded with gun-powder and divers leaden shot, which he the said A in both his hands then and there had and held, at and against one X then and there feloniously and unlawfully did shoot, with intent,'' etc., as in the last section.[95]

94. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 446, (19th Ed.) 709. It is perceived that the acts constituting the attempt to drown are here set out, as by the better American authority they probably ought to be. Ante, § 646. See also Dir. & F., § 553.

95. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 447, (19th Ed.) 709. And see Reg. v. Brown, 10 Q. B. D. 381, 15 Cox, C. C. 199.

Evidence.—Archbold deems it necessary to prove that the gun was loaded in a way to do execution. Referring to Rex v. Carr, Russ. & Ry. 377; Rex v. Kitchen, Russ. & Ry. 95; Rex v. Hughes, 5 Car. & P. 126; Rex v. Coates, 6 Car. & P. 394. This would plainly be so under the clause in our next section against discharging "loaded arms;" since otherwise the "arms" would not be "loaded." But under this clause, it seems in principle that nothing is required of the gun further than that the defendant did "shoot." He continues: "Prove, also, the intent. In Reg. v. Jones, 9 Car. & P. 258, Patteson, J. appeared to think it doubtful whether, upon this section of the statute, it must not appear, in order to make out the intent to murder, that that intent existed in the mind of the defendant at the time of the offense (that the intent must be an actual one, existing, in fact, in the mind of the prisoner, see New Crim. Law, I, §§ 729, 735; II, § 741), or whether it would be sufficient if it would have been murder had death ensued. He said, however, that the circumstance that it would have been murder if death had ensued would be a good ground whence the jury might infer the existing intent, as every man must be taken to intend the necessary consequences of his acts." As to similar American statutes and the procedure thereunder, see S. v. Smith, 41 La. Ann. 791; Whitman v. S., 17 Neb. 224; C. v Patrick, 80 Ky. 605; P.

§ 653. Attempt to discharge Loaded Arms to Murder.—By another clause of the same statute, it is indictable to, "by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at" one, "with the intent to murder." Thereon the indictment may charge that on, etc., at, etc., the defendant A "did, by drawing the trigger of a certain pistol, then and there loaded with gunpowder and one leaden bullet, which said pistol the said A in his right hand then and there had and held, feloniously and unlawfully attempt to discharge the said pistol at and against one X with intent," etc., as in the preceding forms.[96]

§ 654. Stabbing to Murder.—Under the words of the before-mentioned 7 Will. 4 & 1 Vict. c. 85, § 2, "stab, cut, or wound any person, with intent to commit murder," the allegation might be that on, etc., at, etc., A, the defendant, "one X, in and upon the right side of the belly, between the short ribs of him the said X, then and there feloniously

v. McFadden, 65 Cal. 445, 4 P. 421; P. v. Lee Kong, 95 Cal. 666, 30 P. 800, 29 Am. St. 165; Pugh v. S., 2 Tex. Ap. 539; P. v. Raher, 92 Mich. 165, 31 Am. St. 575, 52 N. W. 625.

96. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 448, (19th Ed.) 710. See further as to the indictment. S. v. Young, 26 Iowa, 122; Harrison v. S., 2 Coldw. 232; Pontius v. P., 82 N. Y. 339; S. v. McDonald, 39 La. Ann. 959, 3 So. 92; S. v. Gainus, 86 N. C. 632; Cross v. S., 55 Wis. 261, 12 N. W. 425; Douglass v. S., 26 Tex. Ap. 109, 9 S. W. 489.

Evidence. Archbold adds: "Prove that the defendant presented a pistol or gun at X, and attempted, by pulling the trigger, to discharge it at him. Where, upon an indictment for attempting to discharge a gun at one, it appeared that the gun was loaded, but the jury found that it was not primed, a majority of the judges considered it equivalent to a finding that it was not so loaded as to be capable of doing mischief by pulling the trigger, and were, therefore, of opinion that it was not loaded within the meaning of the statute. Rex v. Carr, Russ. & Ry. 377. See Reg. v. Baker, 1 Car. & K. 254; Reg. v. James, 1 Car. & K. 530. So, if a pistol be loaded with powder and a bullet, but the touch-hole be plugged so that it cannot possibly be fired, it is not 'loaded arms' within the meaning of the statute. Rex v. Harris, 5 Car. & P. 159." As to the meaning of the term "Loaded Arms," see Stat. Crimes, § 322; New Crim. Law, I, § 758 (2). As to the common-law offense, see Usher v. C., 2 Duv. 394. And see March v. S., 3 Tex. Ap. 107.

and unlawfully did stab, cut, and wound, with intent," etc., as in the preceding forms.[97]

§ 655. A General Form of the Indictment,—under our somewhat varying American statutes, to the particular words whereof it must be made to conform, would be that, on, etc., at, etc., the defendant A did (feloniously, if a felony [98]) make an assault on X, or did do some other thing specified by the statute, after the principles pointed out under the title "Attempt," [99] with intent feloniously and of his malice aforethought to murder the said X, or with such other form of the intent as will satisfy the legislative terms.[1]

§ 656. 1. The Weapon—with which the assault was made [2] need not be stated, unless required by the phraseology of the statute. And—

97. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 449. And see C. v. Nutter, 8 Grat. 699. Archbold proceeds: "The instrument or means by which the wound was inflicted need not be stated; and if stated, do not confine the prosecutor to prove a wound, etc., by such means. Rex v. Briggs, 1 Moody, 318. Evidence of a stabbing only will not support an allegation of cutting only. Rex v. McDermott, Russ. & Ry. 356. . . . It is not necessary that the prosecutor should be cut in a vital part; for the question is not what the wound is, but what wound was intended. Rex v. Hunt, 1 Moody, 93; Rex v. Griffith, 1 Car. & P. 298." Johnson v. S., 53 Neb. 103, 73 N. W. 463.

98. S. v. Yates, 21 W. Va. 761.

99. Ante, § 71 et seq.

1. American cases before cited to this sub-title. Montgomery v. S., 4 Tex. Ap. 140; Stewart v. S., 4 Tex. Ap. 519; S. v. Jennings, 35 Tex. 503; Greenwood v. S., 35 Tex. 587; Harrison v. S., 2 Coldw. 232; S. v. O'Connor, 11 Nev. 416; Jarrell v. S., 58 Ind. 293; Cole v. S., 5 Eng. 318; Reg. v. Burgess, Leigh & C. 258; C. v. Nutter, 8 Grat. 699; Rex v. Giles, 7 How. St. Tr. 1129; McCoy v. S., 3 Eng. 451; Nixon v. P., 2 Scam. 267, 35 Am. D. 107; S. v. Johnson, 9 Nev. 175; Thurmond v. S., 55 Ga. 598; S. v. Thomas, 29 La. Ann. 601; S. v. Greenhalgh, 24 Mo. 373; P. v. Pettit, 3 Johns. 511; Cronkhite v. S., 11 Ind. 307; S. v. O'Flaherty, 7 Nev. 153; S. v. Roderigas, 7 Nev. 328; Garcia v. S., 19 Tex. Ap. 389; Cupp v. C., 87 Ky. 35, 7 S. W. 405; S. v. Melton, 102 Mo. 683, 15 S. W. 139; S. v. Sayloor, 6 Lea, 586; Allen v. S., 13 Tex. Ap. 28; Davis v. S., 45 Ark. 464; Knight v. S., 44 Fla. 94, 32 So. 110; Abbott v. S., 77 Ark. 337, 91 S. W. 754; S. v. Dixon, 7 Idaho, 518, 63 P. 801.

2. Hines v. S., 3 Tex. Ap. 483; Payne v. S., 5 Tex. Ap. 35; Montgomery v. S., 4 Tex. Ap. 140; Harrison v. S., 2 Coldw. 232; S. v. Mc-

2. **The Manner in which it was held**—need not ordinarily be averred.[3]

3. **Different Means,**—whereby the assault was made, may be alleged in one count or several, to be determined by the terms of the statute, the particular facts, and the rules of good pleading; then, on the trial, the court will not ordinarily require any election from the prosecuting officer, but permit him to submit his whole case to the jury.[4]

§ 657. 1. **"Malice Aforethought."**—If the killing meant was murder, it would be, at least, proper to charge the assault as of "malice aforethought;" for if this degree of malice did not in fact prompt it, the offense would not be assault with intent to murder. Yet the foregoing English forms do not so aver the assault, though they do the intent.[5] By some American opinions, the latter, at least, is necessary.[6] Others do not require it.[7] Practically, in the absence of distinct adjudications in the particular State, it is best to insert, in the indictment for assault to murder, the words descriptive of murder, and in the part of it declaratory of the intent. Where the crime meant is less than murder they are unnecessary.[8]

Clure, 25 Mo. 338. Indictment need not state pistol was loaded with powder and ball. S. v. Shunka, 116 Ia. 206, 89 N. W. 977; Davis v. U. S., 16 App. D. C. 442; Mathis v. S., 39 Tex. Cr. 549, 47 S. W. 464; Jackson v. Com., 96 Va. 107, 30 S. E. 452.

3. S. v. McDonald, 67 Mo. 1; Ash v. S., 56 Ga. 583; S. v. Smith, 2 Humph. 457.

4. C. v. Creed, 8 Gray, 387; Southworth v. S., 5 Conn. 325; Rex v. Towle, Russ. & Ry. 314, 2 Marshall, 466; Reg. v. Strange, 8 Car. & P. 172; Wilson v. S., 18 Ohio, 143; S. v. McDonald, 67 Mo. 1.

5. Ante, § 645 (1), 651-654.

6. Sarah v. S., 28 Miss. 267, 61 Am. D. 544; S. v. Wilson, 7 Ind. 516. And see Rice v. S., 16 Ind. 298. So, also in Georgia. S. v. Howell, 1 Ga. Decis. 158. See likewise McCoy v. S., 3 Eng. 451; Curtis v. P. Breese, 197; S. v. Tetrick, 199 Mo. 100, 97 S. W. 564.

7. Kilkelly v. S., 43 Wis. 604; P. v. Pettit, 3 Johns. 511; S. v. Jennings, 35 Tex. 503; Harrison v. S., 2 Coldw. 232; S. v. Forney, 24 La. Ann. 191; S. v. Phelps, 24 La. Ann. 493; Hockley v. P., 30 Colo. 119, 69 P. 512; S. v. Shunka, 116 Iowa, 206, 89 N. W. 977; S. v. High, 116 La. 79, 40 So. 538; S. v. Temple, 194 Mo. 228, 92 S. W. 494; S. v. Kelly, 41 Ore. 20, 68 P. 1; S. v. Michel, 20 Wash. 162, 54 P. 995.

8. S. v. Greenhalgh, 25 Mo. 373; Robinson v. C., 16 B. Monr. 609.

2. "**Unlawfully**"—not being required in the indictment for murder,[9] *a fortiori* it is not in this for the attempt.[10]

§ 658. **If needlessly a Battery**—is alleged, not being within the statutory terms, the indictment is not consequently ill.[11]

§ 659. **Variance.**—Since the substance of the issue only must be proved,[12] a charge of assault with a "basket knife" will be sustained by evidence of an assault with a basket iron; because the two weapons produce like injuries, which is the test as to variance.[13]

§ 660. **The Verdict**—is shown in a previous chapter.[14] Where the particular intent alleged is not proved, it may be, guilty of simple assault, or of assault and battery.[15] In some of the States, on an indictment for assault with intent to commit murder, there may be a finding of guilty of assault with intent to commit manslaughter; in others, not.[16] In Wisconsin, on such an indictment, a verdict of assault with intent to maim or disfigure would be ill.[17]

And see S. v. Moore, 65 Mo. 606; S. v. Shunka, 116 Ia. 206, 89 N. W. 977.

9. Ante, § 543 (2).

10. S. v. Williams, 3 Fost. N. H. 321.

11. Cole v. S., 5 Eng. 318.

12. Ante, §§ 555, 650 (1).

13. S. v. Dame, 11 N. H. 271, 35 Am. D. 495. See C. v. Walsh, 132 Mass. 8. For other questions of variance, see S. v. Melton, 102 Mo. 683, 15 S. W. 139; Lacefield v. S., 34 Ark. 275, 36 Am. R. 8; P. v. Raher, 92 Mich. 165, 31 Am. St. 575, 52 N. W. 625; McGehee v. S., 62 Miss. 772, 52 Am. R. 209.

14. Ante, §§ 640-642; Wilson v. S., 62 Ga. 167.

15. New Crim. Law, I, §§ 794, 795; Foley v. S., 9 Ind. 363; Reynolds v. S., 11 Tex. 120; S. v. Scannell, 39 Me. 68; S. v. Burns, 8 Ala. 313; Mooney v. S., 33 Ala. 419; Johnson v. S., 17 Tex. 515; S. v. Bowling, 10 Humph. 52; P. v. Vanard, 6 Cal. 562; Whilden v. S., 25 Ga. 396, 71 Am. D. 181.

16. S. v. White, 45 Iowa, 325; Jarrell v. S., 58 Ind. 293; S. v. Connor, 59 Iowa, 357, 44 Am. R. 686, 13 N. W. 327. And see S. v. Phinney, 42 Me. 384.

Second jeopardy. Where there can be no conviction for the minor offense, an acquittal of the higher will not bar a fresh indictment for the lower. S. v. Wightman, 26 Mo. 515.

17. Kilkelly v. S., 43 Wis. 604. And see Long v. S., 46 Ind. 582.

§ 661. 1. **The Evidence**—is, in the main, considered in connection with that of the substantive offense.[18]

2. **The Intent**—must be proved to have been in fact, not merely as a presumption of law, the same which is alleged.[19] Yet practically a third person cannot directly swear to it,[20] so the jury will infer it from any appropriate evidence.[21]

§ 662. **Proof of Another Fight**—between the same parties will be admissible if both are so connected that the one is of the *res gestae* of the other; otherwise, not. The length of the interval between the two is immaterial.[22] In one case, where, under special circumstances, it was but a half hour, the evidence was rejected;[23] in another, where it was two years.[24] But doubtless there may be instances justifying the contrary result, though the interval is even greater than the longer of these periods.

18. Ante, § 597 et seq. As to what is adequate for a conviction, see Tatum v. S., 59 Ga. 638; Madden v. S., 58 Ga. 563. And see P. v. Keefer, 18 Cal. 636; Murray v. S., 36 Tex. 642. Nature of assault, and character and location of wounds are relevant. P. v. Kafoury, 16 Cal. Ap. 718, 117 P. 938.

19. New Crim. Law, I, §§ 735 (2), 736 (1); Gilbert v. S., 90 Ga. 691, 16 S. E. 652; Davis v. S., 15 Tex. Ap. 475; Hudgins v. S., 61 Ga. 182; Scott v. S., 49 Ark. 156, 4 S. W. 75; Chrisman v. S., 54 Ark. 283, 26 Am. St. 44, 15 S. W. 889; Friederich v. P., 147 Ill. 310, 35 N. E. 472; P. v. Kafoury, 16 Cal. Ap. 718, 117 P. 938; Johnson v. S., 53 Fla. 45, 43 So. 779; S. v. Williamson, 203 Mo. 591, 102 S. W. 519.

20. Drake v. S., 29 Tex. Ap. 265.

21. Vol. II, § 1101; Revels v. S., 33 Fla. 308, 14 So. 821; S. v. Hickam, 95 Mo. 322, 6 Am. St. 54, 8 S. W. 252; Bateman v. S., 64 Miss. 233; S. v. Sanders, 106 Mo. 188, 17 S. W. 223; Henderson v. S., 70 Ala. 29; Sullivan v. S., 31 Tex. Cr. 486, 37 Am. St. 826, 20 S. W. 927; Yanke v. S., 51 Wis. 464, 8 N. W. 276; Walker v. S., 85 Ala. 7, 7 Am. St. 17, 4 So. 686; P. v. Niles, 44 Mich. 606, 7 N. W. 192; McGuire v. S., 10 Tex. Ap. 125.

22. Ante, § 625.

23. Whilden v. S., 25 Ga. 396, 398, 71 Am. D. 181.

24. Hatcher v. S., 18 Ga. 460.

For Horse Racing, see Stat. Crimes; Horse Stealing, see Stat. Crimes also Larceny; House-Breaking, see Burglary and other Breakings; House-Burning, see Arson; House, Disorderly, see Disorderly House; House of Ill-Fame, see Bawdy House; Illegal Meeting, see Unlawful Assembly; Imprisonment, False, see False Imprisonment; Incest, see Stat. Crimes; Indecent Exposure, see Exposure of Person.

§ **663. In Conclusion,**—the practitioner should bring before him the general rules, the statutes of his own State, and the practice special to his own court, then shape his prosecution or defense, not by the demands of one, but of all combined.

CHAPTER CXXXII.

INSANITY IN DEFENCE.

Consult—for the law of insanity, New Crim. Law, I, §§ 374-396a. For forms in setting it up in defence, Dir. & F., §§ 1061-1063.

§ 664. Insanity—will either exempt the defendant from being tried,[25] or, on the trial, rebut the charge of guilt.

§ 665. How Chapter divided.—We shall consider, I. The Practice on the Preliminary Inquiry; II. The Presumptions and Burden of Proof on the Main Issue; III. The Witnesses, their Testimony, and the other Evidence.

I. *The Practice on the Preliminary Inquiry.*

§ 666. 1. **Counsel.**—Present insanity implies a disability to employ, control, or discharge counsel. And the doctrine is believed to be that when the court sees a reasonable ground to institute or persevere in this defense, it will take care that the prisoner has suitable counsel therein, whom it will not permit him to reject, restrain, or dismiss.[26]

2. **When and How.**—An insane man cannot even plead to an indictment;[27] therefore, if, at the arraignment, counsel have reason to suppose their client too insane to take his trial, they should then make the objection, which, it is

25. Vol. II, § 950c; New Crim. Law, I, § 396; Taylor v. C., 109 Pa. 262; S. v. Reed, 41 La. Ann. 581, 7 So. 132; Reg. v. Keary, 14 Cox C. C. 143; Green v. S., 88 Tenn. 634, 14 S. W. 489.

26. Vol. I, § 303; Rex v. Frith, 22 How. St. Tr. 307; P. v. Goldenson, 76 Cal. 328, 19 P. 161; Reg. v. Pearce, 9 Car. & P. 667.

27. 1 Hale P. C. 34, 35; C. v. Braley, 1 Mass. 103; Jordan v. S., 124 Tenn. 81, 135 S. W. 327.

believed, can be adequately done orally to the court.[28] Or the objection may proceed from a third person on affidavit.[29] Or the court may take it on its own observations.[30] It is not technically too late at any subsequent stage of the cause, prior to the commencement of the trial.[31] When the trial has begun, there are obvious reasons against stopping it; and it is, at least, within the discretion of the court to let it proceed, and submit the two issues to the jury together.[32]

3. **How tried.**—This question of present insanity is properly, and in practice is generally, submitted to a jury;[33] which may be either one of the regular juries attending on the court, or one specially impanelled for the

28. Reg. v. Southey, 4 Fost. & F. 864; Reg. v. Turton, 6 Cox C. C. 385.

29. Guagando v. S., 41 Tex. 626.

30. Rex v. Frith, 22 How. St. Tr. 307, 311; Reg. v. Whitfield, 3 Car. & K. 121; Rex v. Pritchard, 7 Car. & P. 303; Rex v. Dyson, 7 Car. & P. 305. See C. v. Braley, 1 Mass. 103; C. v. Meriam, 7 Mass. 168; Green v. S., 88 Tenn. 634, 14 S. W. 489; Johnson v. S., 57 Fla. 18, 49 So. 40; Marshall v. Ter., 2 Okla. Cr. 136, 101 P. 139.

31. 1 Hale P. C. 35; Freeman v. P., 4 Denio, 9.

32. Reg. v. Southey, supra; S. v. Khoury, 149 N. C. 454, 62 S. E. 638; S. v. Haywood, 94 N. C. 847; S. v. Vann, 84 N. C. 722. and see Reg. v. Berry, 1 Q. B. D. 447.

After conviction,—the inquiry as to insanity is not too late; for there can be neither sentence nor any other step against a man while insane. Bonds v. S., Mart. & Yerg. 142, 17 Am. D. 795; C. v. Buccieri, 153 Pa. 535, 570, 26 A. 228, 245; Ex rel. Chandler, 45 La. Ann. 696, 12 So. 884; S. v. Reed, 41 La. Ann. 581, 7 So. 132; S. v. Hebert, 39 La. Ann. 319, 1 So. 872. As to insanity at time of sentence. Johnson v. S. (Ark. 1911), 133 S. W. 596. Insanity after conviction. Smith v. Com., 33 Ky. L. 998, 112 S. W. 615; In. Lang, 77 N. J. L. 207, 71 A. 47; S. v. Reed, 41 La. Ann. 581, 7 So. 132. Insanity after conviction may be tried by jury, S. ex rel. Chandler, 45 La. Ann. 296, 12 So. 884. By other authorities if judge has no doubt of sanity of accused he may sentence, P. v. Knott, 122 Cal. 410, 55 P. 154; Com. v. Schmons, 162 Pa. 326, 29 A. 644; S. v. Nordstrom, 21 Wash. 403, 58 P. 248.

33. Guagando v. S., 41 Tex. 626; Rex v. Frith, supra; Reg. v. Dwerryhouse, 2 Cox C. C. 446; Bonds v. S. (Mart & Yerg.), 142, 17 Am. D. 795; P. v. Farrell, 31 Cal. 576; C. v Braley, 1 Mass. 103; S. v. Harris, 8 Jones, N. C. 136, 78 Am. D. 272; P. v. Lake, 2 Par. Cr. 215; Shultz v S., 13 Tex. 401; S. v. Charles, 124 La. 744, 50 So. 699; Marshall v. Ter., 2 Okla. Cr 136, 101 P. 139.

purpose. But this course is not imperative; the court has the discretion, on its own inspection of the prisoner's mental condition, and without the aid of a jury's finding, to decline the trial on the main issue, or direct the question to be tried with the plea of not guilty.[34]

§ 667. 1. **The Time**—to which this inquiry relates is, it is perceived, the present,—what is the mental condition now, not what it was when the offense was committed.[35] And—

2. **The Test of Insanity**—is not precisely the same as on the main issue; it is whether the prisoner can make a rational defense.[36]

§ 668. 1. **The Evidence,**—it seems, need not be limited by the judge within strict rules, its purpose being to en-

34. Webber v. C., 119 Pa. 223, 4 Am. St. 634, 13 A. 427; Crocker v. S., 60 Wis. 553, 19 N. W. 435. When William Freeman was in 1846 tried for murder (New Crim. Law, I, § 376 (4) note), the first inquiry was whether he was sufficiently sane to take his trial. See, on this and other particulars, P. v. Freeman, Hall's Trial of Freeman. This question was submitted to a jury as the more discreet course; though, in point of law, it was deemed competent for the judge to adopt any other suitable method of ascertaining the fact. Freeman v. P., 4 Denio, 9, 47 Am. D. 216. The verdict of the jury negatived the insanity; he was tried on the merits and convicted; a new trial was granted; then, when he was about to be tried a second time on the merits, the judge visited him in his cell, and there satisfied himself of his present deranged condition, and without referring the question to a jury, or making further public inquiry, refused to try him. New Crim. Law, I, § 376 (4) note, par. 9. See also Jones v. S., 13 Ala. 153; In re Ross, 38 La. Ann. 523; Marler v. S., 67 Ala. 55, 42 Am. R. 95; Hoiss v. S., 79 Wis. 513, 48 N. W. 517; McQuinn's Petition, 65 N. H. 84, 18 A. 92; Bennett v. S., 57 Wis. 69, 46, Am. R. 26, 14 N. W. 912; French v. S., 85 Wis. 400, 39 Am. St 855, 55 N. W. 566; P. v. McElvaine, 125 N. Y. 596, 26 N. E. 929; Perry v. S., 87 Ala. 30, 6 So. 425; U. S. v. Chisholm, 149 Fed. 284; S. v. Church, 199 Mo. 655, 98 S. W. 16; S. v. Superior Court (Wash. 1907), 88 P. 207.

35. S. v. Arnold, 12 Iowa, 479; S. v. Grandahl, 131 Ia. 602, 109 N. W. 121; S v. Crane, 202 Mo. 54, 100 S. W. 422.

36. New Crim. Law, I, § 396; Freeman v. P., 4 Denio, 9; Reg. v. Berry, 1 Q. B. D. 447, 450; Rex v. Pritchard, 7 Car. & P. 303; Jordan v. S., 124 Tenn. 81, 135 S. W. 327; Marshall v. Ter., 2 Okla. Cr. 136, 101 P. 139. In re Lamb, 118 N. Y. S. 389.

lighten a discretion. Thus, the prisoner may be permitted to make statements and observations to the court and the jury, and what they see and hear of him they may take into the account[37] He cannot challenge jurors peremptorily, but he may for cause.[38]

2. **The Hearing**—may probably, if deemed best, be private.[39]

3. **The Finding**,—on this preliminary question, that the prisoner is not insane, is not receivable against him on the trial of the main issue.[40]

II. *The Presumptions and Burden of Proof on the Main Issue.*

§ 669. 1. **The Indictment**—does not in terms charge that the accused is of sound mind, even when on a statute having the words "of sound memory and discretion."[41] For sanity, though essential to crime, therefore necessary to be in some way alleged, is sufficiently so by mere averment of the criminal act, because it is the *prima facie* condition of mankind.[42] Hence also,—

2. **A Plea of Insanity**—is not required where this defense is relied on, but it may be shown on "not guilty,"[43] which in its very nature includes it. Now,—

37. Rex v. Frith, 22 How. St. Tr. 307; Reg. v. Goode, 7 A. &. E. 536.

38. Freeman v. P., 4 Denio, 9, 47 Am. D. 216.

39 Reg. v. Davies, 6 Cox C. C. 326, 3 Car. & K. 328. And see, as to the course of the hearing, this case and Reg. v. Turton, 6 Cox C. C. 385.

40. Freeman v. P., 4 Denio, 9, 39, 47 Am. D. 216. And see Shultz v. S., 13 Tex. 401.

41. Fahenestock v. S., 23 Ind. 231; Snell v. S., 50 Ind. 516. For this statute, see New Crim. Law, II, § 724 (1).

42. Post, §§ 672, 673; Armstrong v. S., 30 Fla. 170, 11 So. 618; O'Connell v. P., 87 N. Y. 377, 41 Am. R. 379; Pribble v. P., 49 Colo. 210, 112 P. 220; P. v. Findley, 132 Cal. 301, 64 P. 472; Davis v. S., 44 Fla. 32, 32 So. 822; S. v. Wetter, 11 Ida. 433, 83 P. 431; S. v. Hill, 65 N. J. L. 626, 47 A. 814.

43. P. v. Olwell, 28 Cal. 456; Danforth v. S., 75 Ga. 614, 58 Am. R. 480; S. v. Speyer, 207 Mo. 540, 106 S. W. 505; S. v. Potts, 100 N. C. 457, 6 S. E. 657.

3. **This is not a Special Defense,**—like, for example, a former jeopardy, wherein by all opinions the defendant takes the burden of proof.[44] On the other hand,—

4. **A Mere Denial of Guilt**—is the defendant's contention that he was insane when he did the act; for it is simply a claim that he had not the criminal intent, which is an indispensable element in every crime.[45] It is the same defense as that he had not the requisite age,[46] or that he acted under an innocent mistake of fact,[47] or that being a wife her husband coerced her.[48] In other words, it is a part of the plea of not guilty to the government's accusation. Hence,—

5. **The Burden of Proof**—is, in principle, not shifted from the State to the defendant. But on the whole evidence, considered in connection with the presumptions, which are equivalent to evidence, and especially the presumption of sanity, the jury should convict him if satisfied beyond a reasonable doubt that he did the act alleged, and that therein he was impelled by the law's criminal intent, which he could not have been if insane. Otherwise the verdict should be not guilty.[49] Especially,—

6. **The Issue of Guilty or not Guilty,**—which is the only issue of record, should not be treated, either by court or jury, as a collection of minor issues, of which that of sanity or insanity is one, but it should be regarded in the proofs, the same as in the record, as simply a call to the jury to say whether or not the defendant is guilty of the *crime* (not of being of this or that mental capacity), beyond a reasonable doubt.[50] Now,—

§ 670. 1. **That such is the Law,**—as to the issue, burden of proof, and duty of the jury, we have thus seen to be

44. Vol. II, § 1048 (2).

45. New Crim. Law, I, §§ 375 (1), 381 (2).

46. New Crim. Law, I, § 367 et seq.

47. Ib. §§ 301-310.

48. Ib. § 362 et seq.

49. Vol. II, §§ 1048-1051; ante, § 599; post, § 673.

50. Vol. II, §§ 1049-1051, 1093, 1095, where the rule, as embodied in our general crimial law, is carefully stated. And see Hornish v. P., 142 Ill. 620, 32 N. E. 677.

settled in reason, in the form of the record, and our embodied criminal procedure. If, under this minor head of the defense of insanity, there are judicial utterances or decisions contrary to what is just stated, they are contradictory to fundamental doctrine; and we saw, a little way back, that a contradiction in the law cannot stand.[51] Still, it will be helpful to the reader, in the midst of a maze of conflicting things. to see something of the judicial utterances and decisions, and be referred to the cases.

2. **That the Burden of Proof shifts**—is widely maintained in one or the other of two forms, either that nominally the burden is cast on one who sets up insanity in defense to prove it as a separate issue, or else to overcome in this manner the law's presumption of sanity; though the evidence, it is conceded, may come as well from the government's witnesses as from his own.[52] But—

51. Ante, § 585 (2), 587 (1),

52. 3 Greenl. Ev. § 5; C. v. Heath, 11 Gray, 303, a case of idiocy, the court reserving the question whether the same rule would apply in a case of insanity proper; Newcomb v. S., 37 Miss. 383; P. v. Robinson, 1 Par. Cr. 649; S. v. Brinyea, 5 Ala. 241; S. v. McCoy, 34 Mo. 531, 86 Am. D. 121; P. v. Myers, 20 Cal. 518; P. v. Coffman, 24 Cal. 230; Boswell v. C., 20 Grat. 860, 875; S. v. Klinger, 43 Mo. 127; Bergin v. S., 31 Ohio St. 111; P. v. Bell, 49 Cal. 485; Humphreys v. S., 45 Ga. 190, 192; Lynch v. C., 77 Pa. 205; S. v. Lawrence, 57 Me. 574; Bond v. S., 23 Ohio St. 349; Reg. v. Layton, 4 Cox C. C. 149; Reg. v. Stokes, 3 Car. & K. 185; McKenzie v. S., 26 Ark. 334; S. v. Felter, 32 Iowa, 49; S. v. Hundley, 46 Mo. 414; S. v. Coleman, 27 La. Ann. 691; S. v. Brown, 12 Minn. 538; S. v. Stickley, 41 Iowa, 232; S. v. Redemeier, 71 Mo. 173, 36 Am. R. 462; Mendiola v. S., 18 Tex. Ap. 462; P. v. Walter, 1 Idaho, n. s. 386; S. v. Hoyt, 46 Conn. 330; S. v. Coleman, 20 S. C. 441; Baccigalupo v. C., 33 Grat. 807, 36 Am. R. 795. In civil cases, the doctrine is very clearly so. Van Dusen v. Van. Dusen, 5 Johns. 144; Caldwell v. King, 4 Cow. 207; Armstrong v. Timmons, 3 Harring. (Del.) 342; Burton v. Scott, 3 Rand. 399; Myatt v. Walker, 44 Ill. 485; Rayfield v. S., 167 Ala. 94, 52 So. 833; P. v. Suesser, 142 Cal. 354, 75 P. 1093; Pribble v. P., 49 Colo. 210, 112 P. 220; S. v. Cole, 2 Pen. (Del.) 344, 45 A. 391; S. v. Lee (Del. 1909), 74 A. 4; Johnson v. S., 57 Fla. 18, 49 So. 40; Hobbs v. S., 8 Ga. Ap. 53, 68 S. E. 515; S. v. Robbins, 109 Ia. 650, 80 N. W. 1061; S. v. Humbless, 126 Ia. 462, 102 N. W. 409; S. v. Scott, 49 La. Ann. 253, 21 So. 271, 36 L. R. A. 721; S. v. Porter, 213 Mo. 43, 111 S. W. 529; S. v. Cloninger, 149 N.

§ 671. **Weight of Evidence.**—Assuming the burden to be thus on the defendant, still, by the correct doctrine, as explained in the first volume,[53] a mere preponderance of the evidence over the presumption of sanity, as in civil cases, which does not exclude reasonable doubt, suffices. Most of those who deem the burden thus to shift so hold;[54] but there are exceptional cases which seem to require defendants to establish this contention beyond a reasonable doubt,[55] and perhaps others which occupy a sort of middle

C. 567, 63 S. E. 154; S. v. Hancock, 151 N. C. 699, 66 S. E. 137; Snider v. S., 56 Neb. 309, 76 N. W. 574; S. v. Austin, 71 Ohio St. 317, 73 N. E. 219, 104 Am. St. 778; Com. v. Heidler, 191 Pa. St. 375, 43 A. 211, 44 W. N. C. 310; Thomas v. S.. 55 Tex. Cr. 293, 116 S. W. 600; Smith v. S., 55 Tex. Cr. 563, 117 S. W. 966; S. v. Brown, 36 Utah, 46, 102 P. 641; S. v. Clark, 34 Wash. 485, 76 P. 98, 101 Am. St. 1006; S. v. Craig, 52 Wash. 66, 100 P. 167

53. Vol. II, § 1095.

54. Carter v. S., 56 Ga. 463; S. v. Hundley, 46 Mo. 414, 417; P. v. Wilson, 49 Cal. 13; S. v. Felter, 32 Iowa, 49; Bond v. S., 23 Ohio St. 349, 357; Meyers v. C., 83 Pa. 131; P. v. Bell, 49 Cal. 485; S. v. Strauder, 11 W. Va. 745, 823; Bergin v. S., 31 Ohio St. 111; Pannell v. C., 86 Pa. 260; P. v. McCann, 16 N. Y. 58, 62, 69 Am. D. 642; P. v. Myers, 20 Cal. 518; S. v. Klinger, 43 Mo. 127; C. v. Rogers, 7 Met. 500, 41 Am. D. 458; S. v. McCoy, 34 Mo. 531, 536, 86 Am. D. 121; S. v. Starling, 6 Jones, N. C. 366; P. v. Coffman, 24 Cal. 230, 237; Coates v. S., 50 Ark. 330, 7 S. W. 304; P. v. Messersmith, 61 Cal. 246; C. v. Gerade, 145 Pa. 289, 27 Am. St. 689, 22 A. 464; P. v. Ward, 105 Cal. 335; Lovegrove v. S., 31 Tex. Cr. 491, 21 S. W. 191; Parsons v. S., 81 Ala. 577, 60 Am. R. 193, 2 So. 854; Bolling v. S., 54 Ark. 588, 16 S. W. 658; Fisher v. S., 30 Tex. Ap. 502, 18 S. W. 90; S. v. Paulk, 18 S. C. 514; S. v. Trout, 74 Iowa, 545, 7 Am. St. 499, 38 N. W. 405; S. v. Grear, 29 Minn. 221, 13 N. W. 140; Gunter v. S., 83 Ala. 96, 3 So. 600; Williams v. S., 50 Ark. 511, 9 S. W. 5; Rather v. S., 25 Tex. Ap. 623, 9 S. W. 69; S. v. Potts, 100 N. C. 457, 6 S. E. 657; S. v. Williamson, 106 Mo. 162, 17 S. W. 172; S. v. Lewis, 20 Nev. 333, 22 P. 241; S. v. Alexander, 30 S. C. 74, 8 S. E. 440; P. v. Willard, 150 Cal. 543, 89 P. 124; P. v. Oppenheimer, 156 Cal. 733, 106 P. 74; P. v. Casey, 231 Ill. 261, 83 N. E. 278; S. v. Barker, 216 Mo. 532, 115 S. W. 1102; P. v. Carlin, 194 N. Y. 448, 87 N. E. 805; S. v. Hancock, 151 N. C. 699, 66 S. E. 137; Fultz v. S., 50 Tex. Cr. 502, 98 S. W. 1057; U. S. v. Chislom, 153 Fed. 808.

55. S. v. Spencer, 1 Zab. 196; Danforth v. S., 75 Ga. 614, 58 Am. R. 480. In P. v. Schryver, 42 N. Y. 1, 1 Am. R. 480, are stated, and overruled, cases in which it was so held.

ground between these two outer propositions;[56] for example, that the proofs must be simply satisfactory.[57]

§ 672. 1. **The Presumption of Sanity,**—the authorities properly agree, in some way attends the proven acts of the defendant so as to create against him a *prima facie* case,[58] Hence,—

2. **The Defendant must prove**—the insanity on which he relies,[59]—a proposition not necessarily the same as that the burden of proof shifts to him. The difference, not stated in quite uniform terms in the cases, is, on the whole, this: when the burden is said to shift to the defendant,[60] the meaning is that he must prove the insanity as an issue distinct from not guilty, and as a separate question; the jury, to acquit, being obliged to find affirmatively that the defendant was insane, though it is admitted the finding need not appear thus formally in the verdict. On the other side,—

§ 673. 1. **Burden on State—Presumption.**—The doctrine of principle,[61] sustained by a large part of our courts, and rapidly becoming general, is that, as the pleadings inform us, insanity is not an issue by itself, to be passed on separately from the other issues, but, like any other matter in rebuttal, it is involved in the plea of not guilty,

56. S. v. Brinyea, 5 Ala. 241; S. v. Marler, 2 Ala. 43, 36 Am. D. 398; S. v. Huting, 21 Mo. 464; McNaghten's Case, 10 Cl. & F. 200; P. v. Hamilton, 62 Cal. 377; S. v. Payne, 86 N. C. 609. And see Smith v. S., 19 Tex. Ap. 95, 111; Johnson v. S., 10 Tex. Ap. 571.

57. S. v. Harrigan, 9 Houst. 369; C. v. Woodley, 166 Pa. 463, 31 A. 202.

58. Graham v. C., 16 B. Monr. 587; U. S. v. McGlue, 1 Curt. C. C. 1; S. v. Starling, 6 Jones (N. C.) 366; Webb v. S., 5 Tex. Ap. 596; U. S. v. Holmes, 1 Clif. 98; McKenzie v. S., 26 Ark. 334; Humpreys v. S., 45 Ga. 190, 192; P. v. Kirby, 2 Par. Cr. 28; Walter v. P., 32 N. Y. 147, 164; C. v. Heath, 11 Gray, 303; Fisher v. P., 23 Ill. 283. And see the cases cited to the last two sections. P. v. Loper, 159 Cal. 6, 112 P. 720.

59. Cases cited ante, § 670 (2); McNaghten's Case, 10 Cl. & F. 200; S. v. Smith, 53 Mo. 267; Ortwein v. C., 76 Pa. 414, 18 Am. R. 420; Boswell v. C., 20 Grat. 860; S. v. Coleman, 27 L. Ann. 691; Baldwin v. S., 12 Mo. 223.

60. Ante, § 670 (2).

61. Ante, § 669.

upon which the burden of proof is on the prosecuting power;[62] the jury to convict or not according as, on the whole showing, they are satisfied or not, beyond a reasonable doubt, of the defendant's guilt.[63] Of course,—

2. **This Major Proposition**—covers the minor ones within it,[64]—the degree of the offense,[65] the sanity of the offender,[66] the doing of the overt act, and all the rest.[67] But it is not the same as to detach a single item from the general issue,[68] and tell the jury that the defendant need only create in their minds a reasonable doubt of his sanity to secure an acquittal,—a proposition which many have denied.[69] Still,—

3. **This Latter Proposition,**—applied in a case where admittedly the defendant is guilty if he was not insane, does not essentially differ from the true doctrine, and it has considerable judicial approval.[70] Again,—

62. Ante, § 669 (6).

63. Vol. II, §§ 1050 (2), 1051; Wright v. P., 4 Neb. 407; S. v. Smith, 53 Mo. 267; S. v. Crawford, 11 Kan. 32; Westmoreland v. S., 45 Ga. 225; Hornish v. P., 142 Ill. 620, 32 N. E. 677. See Jamison v. P., 145 Ill. 357, 34 N. E. 486.

64. Vol. II, §§ 1052-1054, 1095.

65. Vol. II, § 1095.

66. Wright v. P., 4 Neb. 407, 410; S. v. Crawford, supra; Stevens v. S., 31 Ind. 485, 99 Am. D. 634; Bradley v. S., 31 Ind. 492; McFarland's Trial, 8 Abb. Pr. n. s. 57, 93; S. v. Bartlett, 43 N. H. 224, 80 Am. D. 154; Chase v. P., 40 Ill. 352.

67. Dove v. S., 3 Heisk. 348.

68. I understand that the charge of a court to a jury on a criminal trial should never be thus upon a part of the facts, or a part of the case, but always upon the entire facts and case. Vol. II, § 978; ante, § 599 (3).

69. Ortwein v. C., 76 Pa. 414, 18 Am. R. 420; Boswell v. C., 20 Grat. 860; Kriel v. C., 5 Bush, 362; S. v. Coleman, 27 La. Ann. 691; Lynch v. C., 77 Pa. 205; S. v. Strauder, 11 W. Va. 745, 723; S. v. Hunting, 21 Mo. 464; P. v. Myers, 20 Cal. 518; Westmoreland v. S., 45 Ga. 225, 280.

70. S. v. Marler, 2 Ala. 43, 36 Am. D. 398; Armstrong v. S., 30 Fla. 170, 11 So. 618; Hodge v. S., 26 Fla. 11, 7 So. 593; P. v. Calton, 5 Utah, 451, 16 P. 902; S. v. Mahan, 25 Kan. 182; Brotherton v. P., 75 N. Y. 159; Walker v. P., 88 N. Y. 81; S. v. Nixon, 32 Kan. 205, 4 P. 159; Armstrong v. S., 27 Fla. 366, 26 Am. St. 72, 9 So. 1; Polk v. S., 19 Ind. 170; Bradley v. S., 31 Ind. 492; McDougal v. S., 88 Ind. 24; Plake v. S., 121 Ind. 433, 16 Am. St. 408, 23 N. E. 273; S. v. Hanley, 34 Minn. 430, 432; O'Connell v. P., 87 N. Y. 377, 41 Am. R. 379; King v. S., 91 Tenn. 617, 20 S. W. 169;

4. **Another Form of the Doctrine,**—not differing essentially from this, except in being more expanded and full, is that, while the presumption of sanity must be overcome by proofs,[71] if such normal condition of the mind is denied to have existed in the particular instance, then, if evidence is produced in support of the denial, the jury must judge of it and its effect on the main issue of guilty or not guilty; and if, considering all the evidence, and considering the presumption that what a man does is sanely done, and suffering the evidence and the presumption to work together in their minds, they entertain a reasonable doubt whether the prisoner did the act in a sane state of mind, they are to acquit, otherwise they are to convict.[72] Nice though these distinctions may seem, they are believed to be the only ones consistent with a harmonious interpretation and application to this particular question, of the larger rules of criminal pleading, evidence, and practice.[73]

§ 674. 1. **The Time**—to which the insanity proved must relate, is when the act complained of was committed; it not being sufficient that the defendant was insane before or after, if not also then.[74] Yet—

Ballard v. S., 19 Neb. 609, 28 N. W. 271.

71. Ante, § 672; Walter v. P., 32 N. Y. 147, 164.

72. S. v. Smith, 53 Mo. 267; S. v. Klinger, 43 Mo. 127; Bishop v. S., 96 Miss. 846, 52 So. 21.

73. Consult observations of Metcalf, J. in C. v. Eddy, 7 Gray, 583, 584. See also C. v. Rogers, 7 Met. 500, 506, 41 Am. D. 458; Bonfanti v. S., 2 Minn. 123. Also observations of Bowen, J., in P. v. McCann, 16 N. Y. 58, 62, 69 Am. D. 642; but questioned in P. v. Schryver, 42 N. Y. 1, 8, 1 Am. R. 480. To the like effect, consult what Bellows, J. said in S. v. Bartlett, 43 N. H. 224, 228-230; approved in S. v. Jones, 50 N. H. 369. For other and some conflicting opinions, see Loeffner v. S., 10 Ohio St. 598, 616; Fisher v. P., 23 Ill. 283; Hopps v. P., 31 Ill. 385, 393, 394, 83 Am. D. 231; Polk v. S., 19 Ind. 170, 81 Am. D. 382; Bradley v. S., 31 Ind. 492; Chase v. P., 40 Ill. 352.

74. New Crim. Law, I, §§ 380, 385, 396 (2); Jones v. S., 13 Ala. 153; Graham v. C., 16 B. Monr. 587; S. v. Windsor, 5 Harring. (Del.) 512; P. v. Kleim, Edm. Sel. Cas. 13; P. v. Divine, Edm. Sel. Cas. 594; S. v. Coleman, 27 La. Ann. 691; P. v. Loper, 159 Cal. 6, 112 P. 720; P. v. Kirby, 15 Cal. Ap. 264, 114 P. 794; S. v. Flanney, 61 Wash. 482, 112 P. 630.

2. **Presumptions.**—In a case of permanent insanity, its existence at the trial,[75] or at any other time after or especially before the commission of the act,[76] creates the presumption that it existed also at the time of the offense.[77] Still, if the one period is very remote from the other, either the court will reject the evidence,[78] or its weight with the jury will be impaired.[79] And—

3. **Not Permanent.**—"Some species of insanity are not presumed to be continuing in their nature;" to them the foregoing doctrine does not apply.[80] And one, for exam-

75. Freeman v. P., 4 Denio, 9, 47 Am. D. 216; McAllister v. S., 17 Ala. 434, 52 Am. D. 180; P. v. Brent, 11 Cal. Ap. 674, 106 P. 110; Contra, S. v. Neubauer, 145 Iowa, 337, 124 N. W. 312, 316.

76. New Crim. Law, I, § 385; Peaslee v. Robbins, 3 Met. 164; Vance v. C., 2 Va. Cas. 132; Grant v. Thompson, 4 Conn. 203, 10 Am. D. 119; Kinne v. Kinne, 9 Conn. 102, 21 Am. D. 732; Bryant v. Jackson, 6 Humph. 199; Webb v. S., 5 Tex. Ap. 596; Reg. v. Layton, 4 Cox C. C. 149; S. v. Kring, 64 Mo. 591; S. v. Reddick, 7 Kan. 143; Carpenter v. Carpenter, 8 Bush, 283; S. v. Wilner, 40 Wis. 304; Frazer v. Frazer, 2 Del. Ch. 260; U. S. v. Holmes, 1 Clif. 98; P. v. March, 6 Cal. 543; Watson v. Anderson, 11 Ala. 43; Hendrix v. Money, 1 Bush, 306; Peaslee v. Robbins, 3 Met. 164; Dickinson v. Barber, 9 Mass. 225. See C. v. Lynch, 3 Pittsb. 412. Some courts receive this evidence under greater restrictions when it relates to a time subsequent to that in controversy than when before. C. v. Pomeroy, 117 Mass. 143. Compare with ante, § 428, and the places there referred to. And see Kinne v. Kinne, 9 Conn. 102.

77. Armstrong v. Timmons, 3 Harring. (Del.) 342; Cadwell v. King, 4 Cow. 207; Wray v. Wray, 33 Ala. 187; Van Dusen v. Van Dusen, 5 Johns. 144; Cook v. Cook, 53 Barb. 180; Emery v. Hoyt, 46 Ill. 258; Myatt v. Walker, 44 Ill. 485; Achey v. Stephens, 8 Ind. 411; Crouse v. Holman, 19 Ind. 30; Lee v. Lee, 4 McCord, 183, 17 Am. D. 722; S. v. Davis, 27 S. C. 609, 4 S. E. 567; Green v. S., 88 Tenn. 614, 630, 14 S. W. 430; Grubb v. S., 117 Ind. 277, 285, 20 N. E. 257, 725. See P. v. Smith, 57 Cal. 130; S. v. Pritchett, 106 N. C. 667, 11 S. E. 357.

78. C. v. Pomeroy, 117 Mass. 143; Langdon v. P., 133 Ill. 382, 24 N. E. 874. And see Harden v. Hays, 14 Pa. 91; Wilkinson v. Pearson, 23 Pa. 117. But see Blackburn v. S., 23 Ohio St. 146, 165; Clinton v. Estes, 20 Ark. 216.

79. Sanchez v. P., 22 N. Y. 147; Dickinson v. Barber, 9 Mass. 225, 6 Am. D. 58; Exum v. Canty, 34 Miss. 533. See S. v. Scott, 1 Hawks, 24.

80. Stewart v. Redditt, 3 Md. 67, 81; P. v. Francis, 38 Cal. 183; Carpenter v. Carpenter, 8 Bush, 283; S. v. De Rance, 34 La. Ann. 186, 44 Am. R. 426; Wagner v. S., 116 Ind.

ple, who sets up delirium tremèns must show its existence when he did the act; there is no presumption of it from antecedent fits from which he has recovered.[81] It is the same of insanity caused by violent disease.[82] Still, liability to intermittent insanity may be relevantly shown in connection wth other evidence.[83]

§ 675. 1. **Showing a Cause**—in operation tending to produce insanity[84]—as, that the defendant had been informed of his wife's infidelity[85]—does not alone raise the presumption, and alone is inadmissible. But evidence of this sort,[86] or of the absence of motive to commit the proven act,[87] may be competent in connection with other facts. Thus,—

2. **Insanity in One's Ancestry,**—standing quite alone. does not raise the presumption.[88] But if it is proved by experts to be transmissible,[89] and probably if it is not, the fact being one of common observation known to the jury,[90]

181, 18 N. E. 833. See Overall v. S., 15 Lea, 672.

81. S. v. Sewell, 3 Jones, N. C. 245. See Reg. v. Leigh, 4 Fost. & F. 915; Stuart v. S., 1 Bax. 178; Rafferty v. P., 66 Ill. 118; Casat v. S., 40 Ark. 511; P. v. Packenham, 115 N. Y. 200, 21 N. E. 1035; Ward v. S., 19 Tex. Ap. 664; S. v. Donovan, 61 Iowa, 369, 16 N. W. 206; S. v. Hurley, 1 Houst. Crim. 28; P. v. Miles, 143 N. Y. 383, 38 N. E. 456.

82. Hix v. Whittemore, 4 Met. 545; Corbit v. Smith, 7 Iowa, 60, 71 Am. D. 431. As to Epilepsy,—see Guetig v. S., 63 Ind. 278; Lovegrove v. S., 31 Tex. Cr. 491, 21 S. W. 191; C. v. Buccieri, 153 Pa. 535, 26 A. 228; P. v. Barber, 115 N. Y. 475, 22 N. E. 182; S. v. Townsend, 66 Iowa, 741, 24 N. W. 535; S. v. Hockett, 70 Iowa, 442, 30 N. W. 742; Walsh v. P., 88 N. Y. 458.

83. Reg. v. Richards, 1 Fost. & F. 87. And see Real v. P., 42 N. Y. 270.

84. Carter v. S., 56 Ga. 463; Gillespie v. Shuliberrier, 5 Jones, N C. 157; Willis v. P., 32 N. Y. 715; P. v. Garbutt, 17 Mich. 9, 97 Am. D. 162. See Jumpertz v. P., 21 Ill. 375.

85. Sawyer v. S., 35 Ind. 80, 84.

86. Reg. v. Richards, 1 Fost. & F. 87; Laros v. C., 84 Pa. 200; S. v. Flanney, 61 Wash. 482, 112 P. 630.

87. Reg. v. Layton, 4 Cox C. C. 149; Reg. v. Vyse, 3 Fost. & F. 347.

88. S. v. Simms, 68 Mo. 305; Cole's Trial, 7 Abb. Pr. n. s. 321; Bradley v. S., 31 Ind. 492; Snow v. Benton, 28 Ill. 306; Mather v. Whitefoot, 8 Car. & P. 270.

89. Reg. v. Tucket, 1 Cox C. C. 103.

90. Vol. II, § 975 (2). "The transmission of this predisposition to insanity is matter of general observation, and is recognized by the best medical authorities." Thomas, J. in Baxter v. Abbott, 7 Gray, 71, 81.

mental unsoundness in a blood relation[91]—for example, a brother,[92] the father,[93] or grandfather[94]—will be competent. "It is not in any case," said a learned judge, "evidence of the highest character."[95] And in general,[96] but in reason not necessarily always, the insanity to be explained by this evidence should be of a permanent sort. It should also be of a species like that wherewith the other members of the family were afflicted.[97]

III. *The Witnesses, their Testimony, and the other Evidence.*

Under this sub-title we shall consider—

§ 676. First. *Opinions from Non-expert Witnesses:—*

Only Opinion,—we saw in the first volume, is, philosophically and truly, the testimony of a witness to what we term fact.[98] Yet both in legal and non-professional language we call certain classes of opinion fact, and other classes opinion; and the legal rule, to which there are exceptions, is that a witness can speak only to fact, not to his opinion.[99] The exceptions proceed, a learned judge has observed, "from necessity alone," and this species of evidence is not favored.[1]

91. S. v. Windsor, 5 Harring. (Del.) 512. See Dejarnette v. C., 75 Va. 867.

92. P. v. Garbutt, 17 Mich. 9, 97 Am. D. 162; Hagan v. S., 5 Bax. 615.

93. S. v. Felter, 25 Iowa, 67; S. v. Gambacarta, 197 N. Y. 181, 90 N. E. 809.

94. Reg. v. Tuckett, supra.

95. P. v. Pine, 2 Barb. 566, 572, opinion by Barculo, J.

96. S. v. Christmas, 6 Jones, N. C. 471.

97. Ib.

98. Vol. II, §§ 1073, 1096, 1177.

99. Ib., § 1177; S. v. Folwell, 14 Kan. 105; Fundy v. S., 30 Ga. 400; Zantzinger v. Weightman, 2 Cranch C. C. 478; Massey v. Walker, 10 Ala. 288; Cooper v. S., 23 Tex. 331; S. v. Rhoads, 29 Ohio St. 171; S. v. Brunetto, 13 La. Ann. 45; Jones v. Hatchett, 14 Ala. 743; Keener v. S., 18 Ga. 194, 63 Am. D. 269; Iglehart v. Jernegan, 16 Ill. 513; Saltmarsh v. Bower, 34 Ala. 613; Albatross v. Wayne, 16 Ohio, 513; Gregory v. Walker, 38 Ala. 26; Morehouse v. Mathews, 2 Comst. 514; Morse v. S., 6 Conn. 9; Berry v. S., 10 Ga. 511; Lewis v. Brown, 41 Me. 448; Daniels v. Mosher, 2 Mich. 183; Sowers v. Dukes, 8 Minn. 23; Turner v. S. (Tex. 1911), 133 S. W. 1052; Bishop v. S., 96 Miss. 846, 52 So. 21.

1. Selden, J. in De Witt v. Barly, 17 N. Y. 340, 351; Whittier v. Frank-

§ 677. Opinions supplementing Facts.—One of the exceptions, spoken of in the first volume, is that the witness may supplement his statement of the facts leading to an opinion by the opinion itself, where, in the nature of the transaction, such facts can be but imperfectly transmitted to the minds of the jurors.[2] Within this exception, are questions of personal identity,[3] distances, dimensions, quantities,[4] value,[5] intention,[6] health as appearing to the uned-

lin, 46 N. H. 23; S. v. Montgomery, 121 La. 1005, 46 So. 997.

2. Vol. II, § 1178; S. v. Folwell, 4 Kan. 105; Lewis v. S., 49 Ala. 1; C. v. Thompson, 3 Dana, 301; S. v. Shinborn, 46 N. H. 497, 88 Am. D. 224; Curtis v. Chicago, etc. Ry., 18 Wis. 312; Brennan v. P., 15 Ill. 511; C. v. Sturtivant, 117 Mass. 122, 19 Am. R. 401; Bryan v. Walton, 20 Ga. 480; Wynne v. S., 56 Ga. 113; Parker v. Chambers, 24 Ga. 518; Campbell v. S., 23 Ala. 44; S. v. Avery, 44 N. H. 392; Gentry v. McMinnis, 3 Dana, 382; S. v. Stickley, 41 Iowa, 232; Kent v. Tyson, 20 N. H. 121; McKee v. Nelson, 4 Cow. 355, 15 Am. D. 384; S. v. George, 58 Wash. 681, 109 P. 114; Robinson v. S., 143 Wis. 205, 126 N. W. 750; S. v. Penna, 35 Mont. 535, 90 P. 787. Witness not an expert must narrate facts, Parrish v. S., 139 Ala. 16, 36 So. 1012; Jarvis v. S., 70 Ark. 613, 67 S. W. 76; Blume v. S., 154 Ind. 343, 56 N. E. 771; S. v. Robbins, 109 Iowa, 650, 80 N. W. W. 1061; S. v. Beuerman, 59 Kan. 586, 53 P. 874; S. v. Smith, 106 La. 33, 30 So. 248; S. v. Peel, 23 Mont. 258, 59 P. 169, 75 Am. St. 529; P. v. Casey, 124 Mich. 279, 82 N. W. 833; Snider v. S., 56 Neb. 309, 76 N. W. 574; P. v. Smith, 172 N. Y. 210, 64 N. E. 814; Hurst v. S. (Tex. 1897), 40 S. W. 264; Taylor v. S., 49 Tex. Cr. 7, 90 S. W. 647.

3. Gentry v. McMinnis, supra; Goodwyn v. Goodwyn, 20 Ga. 600; Woodward v. S., 4 Bax. 322.

4. Hackett v. Boston, etc. Rld., 35 N. H. 390; Woodward v. Gates, 38 Ga. 205; Detroit, etc. Rld. v. Van Steinburg, 17 Mich. 99; Eastman v. Amoskeag Manuf. Co., 44 N. H. 143, 82 Am. D. 201.

5. Holton v. Lake, 55 Ind. 194; Tate v. Missouri, etc. Ry., 64 Mo. 149; Carpenter v. Robinson, 1 Holmes, 67, 73; Burger v. Northern Pacific Rld., 22 Minn. 343; Tiffany v. Lord, 65 N. Y. 310; Pennsylvania, etc. Rld. and Canal v. Bunnell, 81 Pa. 414; Ray v. S., 50 Ala. 104; Riggins v. Brown, 12 Ga. 271; Joy v. Hopkins, 5 Denio, 84; Merrill v. Grinnell, 30 N. Y. 594; Ward v. Reynolds, 32 Ala. 384; Illinois, etc. Rld. v. Van Horn, 18 Ill. 257; Ohio, etc. Rld. v. Irvin, 27 Ill. 178; Whitfield v. Whitfield, 40 Miss. 352; Harris v. Panama Rld., 3 Bosw. 7. See Toledo, etc. Rld. v. Smith, 25 Ind. 288; Thorn v. Couchman, 28 How. Pr. 95; Sinclair v. Roush, 14 Ind. 450.

6. Eastwood v. P., 3 Par. Cr. 25, 56; Pierce v. S., 53 Ga. 365; Stanley v. S., 26 Ala. 26.

ucated observation,[7] and various other things of the like sort. Hence,—

§ 678. **A Non-expert Witness,**—in a criminal case wherein insanity is set up in defense, may first state what he personally knows of the party's sayings and doings indicating insanity, then, yet not before, he may add his opinion of such party's mental condition; and it appears to be no objection that in some degree the opinion is based on facts of such a nature that he could not transmit them to the jury. Yet he can deliver no opinion from facts not within his own observation.[8] But—

7. Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535; Milton v. Rowland, 11 Ala. 732; Barker v. Coleman, 35 Ala. 221; Blackman v. Johnson, 35 Ala. 252; Bennett v. Fail, 26 Ala. 605; Norton v. Moore, 3 Head, 480. See McLean v. S., 16 Ala. 672; Bell v. Morrisett, 6 Jones, N. C. 178; Seibles v. Blackwell, 1 McMul. 56; Willis v. Quimby, 11 Fost. N. H. 485.

8. De Witt v. Barly, 17 N. Y. 340, 348; O'Brien v. P., 36 N. Y. 276; Deshon v. Merchants Bank, 8 Bosw. 461; Dunham's Appeal, 27 Conn. 192, 197; Grant v. Thompson, 4 Conn. 203, 208, 10 Am. D. 119; Clary v. Clary, 2 Ire. 78, 80, 81; Real v. P., 42 N. Y. 270, 282; Clapp v. Fullerton, 34 N. Y. 190, 195, 90 Am. D. 681; Gardiner v. Gardiner, 34 N. Y. 155; Crowe v. Peters, 63 Mo. 429; Baldwin v. S., 12 Mo. 223; Hardy v. Merrill, 56 N. H. 227, 22 Am. R. 441 (overruling Boardman v. Woodman, 47 N. H. 120; S. v. Pike, 49 N. H. 399, 6 Am. R. 533, and S. v. Archer, 54 N. H. 465, 468); Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535; McClackey v. S., 5 Tex. Ap. 320; Hickman v. S., 38 Tex. 190; Dove v. S., 3 Heisk. 348; Thomas v. S., 40 Tex. 60; Dennis v. Weeks, 51 Ga. 24; Holcomb v. S., 41 Tex. 125; Pierce v. S., 53 Ga. 365; Powell v. S., 25 Ala. 21; Florey v. Florey, 24 Ala. 241; Norris v. S., 16 Ala. 776; Clark v. S., 12 Ohio, 483, 40 Am. D. 481; Wilkinson v. Pearson, 23 Pa. 117; Baldwin v. S., 12 Mo. 223; Jerry v. Townshend, 9 Md. 145; Pelamourges v. Clark, 9 Iowa, 1; White v. Bailey, 10 Mich. 155; Stackhouse v. Horton, 2 McCarter, 202; Runyan v. Price, 15 Ohio St. 1, 13, 86 Am. D. 459; Farrell v. Brennan, 32 Mo. 328; Cram v. Cram, 33 Vt. 15; Mahoney v. Ashton, 4 Har. & McH. 63; C. v. Gerade, 145 Pa. 289, 27 Am. St. 689, 22 A. 464; Armstrong v. S., 30 Fla. 170, 11 So. 618; Parsons v. S., 81 Ala. 577, 60 Am. R. 193, 2 So. 854; S. v. Lewis, 20 Nev. 333, 22 P. 241; S. v. Pennyman, 68 Iowa, 216, 26 N. W. 82; P. v. Packenham, 115 N. Y. 220, 21 N. E. 1035; S. v. Newlin, 69 Ind. 108; Leaptrot v. S., 51 Fla. 57, 40 So. 616; S. v. Kutzleben (Iowa, 1907), 113 N. W. 484; P. v. Koerner, 191 N. Y. 528, 84 N. E. 1117, affirming 117 A. D. 40, 102 N. Y. S. 43; S. v. Khoury, 149 N. C. 454, 62 S. E. 638; S. v. Constantine, 48 Wash. 218, 93

§ 679. **Adequate Means of Observation**—must have been possessed by the non-expert, to render his opinion admissible;[9] it is not enough that he could testify to some relevant fact.[10] The question of what are such adequate means is not technical; but the witness must have had the opportunity of forming an accurate judgment as to the existence of the insanity, considered with reference to its supposed character or degree.[11]

§ 680. **The Weight of the Evidence**—with the jury will depend on a variety of circumstances.[12] For example, "if the reasons are frivolous or inconclusive," to employ the rather strong language of Williams, J.,

P. 317; S. v. Craig, 52 Wash. 66, 100 P. 167. Admissibility of non-experts opinion on insanity, Braham v. S., 143 Ala. 28, 38 So. 919; Byrd v. S., 76 Ark. 286, 88 S. W. 974; Leaptrot v. S., 51 Fla. 57, 40 So. 616; S. v. Soper, 148 Mo. 217, 49 S. W. 1007; P. v. Spencer, 179 N. Y. 408, 72 N. E. 461; S. v. Barry, 11 N. D. 428, 92 N. W. 809; Com. v. Wireback, 190 Pa. 438, 529, 542, 43 W. N. C. 506; Cannon v. S., 41 Tex. Cr. 467, 56 S. W. 351; Queenan v. Ter., 190 U. S. 548, 23 S. Ct. 762, 47 L. Ed. 1175.

9. S. v. Potts, 100 N. C. 457, 6 S. E. 657; S. v. Bryant, 93 Mo. 273, 6 S. W. 102; Sage v. S., 91 Ind. 141; Wood v. S., 58 Miss. 741; P. v. Lane, 101 Cal. 513, 36 P. 16; S. v. Hayden, 51 Vt. 296; S. v. Maier, 36 W. Va. 757, 15 S. E. 991; Jamison v. P., 145 Ill. 357, 34 N. E. 486; Territory v. Roberts, 9 Mont. 12, 22 P. 132; C. v. Buccieri, 153 Pa. 535, 26 A. 228; P. v. Borgetto, 99 Mich. 336, 58 N. W. 328; Upstone v. P., 109 Ill. 169; S. v. Hayden, 131 Iowa, 1, 107 N. W. 929; Demaree v. Com., 28 Ky. L. 1374, 91 S. W. 1131; S. v. Soper, 148 Mo. 217, 49 S. W. 1007; Ter. v. Padilla, 8 N. M. 510, 46 P. 346; Atkins v. S., 119 Tenn. 458, 105 S. W. 353, 13 L. R. A. (N. S.) 1031; Richards v. Com., 107 Va. 881, 59 S. E. 1104.

10. Florey v. Florey, 24 Ala. 241; Sutton v. Reagan, 5 Blackf. 217, 33 Am. D. 466. And Jerry v. Townshend, 9 Md. 145.

11. Powell v. S., 25 Ala. 21; Stuckey v. Bellah, 41 Ala. 700; Townshend v. Townshend, 7 Gill, 10; Weems v. Weems, 19 Md. 334; Beller v. Jones, 22 Ark. 92; McDougald v. McLean, Winst. i. 120. There are circumstances, perhaps not fully like those contemplated in the text, wherein the witness detailing a particular transaction, may state whether or not the party appeared rational. P. v. Taylor, 138 N. Y. 398, 34 N. E. 275; P. v. Wreden, 59 Cal. 392; S. v. Erb, 74 Mo. 199. And see Nevling v. C., 98 Pa. 322.

12. And see Norris v. S., 16 Ala. 776; Emery v. Hoyt, 46 Ill. 258; Tatum v. Mohr. 21 Ark. 349; Lake v. P., 1 Par. Cr. 495, 541.

"the opinions of witnesses are worth nothing." [13] Yet—

§ 681. **To the Law**—a witness cannot testify,[14] and no question involving his ideas of what it is can properly be admitted. The interrogatories should be shaped to avoid this objection.[15]

§ 682. **Contrary to the Foregoing,**—it is in two or three of our States denied that a non-professional witness to insanity can supplement his testimony to facts by his opinions.[16] In Massachusetts where this is so, Thomas, J., after stating the practical ill workings of the rule on which the denial is founded, said: "If it were a new question, I should be disposed to allow every witness to give his opinion; subject to cross-examination upon the reasons upon which it is based, his degree of intelligence, and his means of observation." [17]

§ 683. Secondly. *Experts and their Testimony*:—

1. **In the Second Volume**—is considered the general doctrine of expert testimony.[18]

2. **Own Observation.**—An expert, from his acquaintance with the party, from having attended him as physician, or from having examined him for the purpose, may

13. Kinne v. Kinne, 9 Conn. 102, 21 Am. D. 732.

14. Elder v. Ogletree, 36 Ga. 64.

15. De Witt v. Barly, 17 N. Y. 340; Runyan v. Price, 15 Ohio St. 1. See Aiman v. Stout, 42 Pa. 114; Wilkinson v. Pearson, 23 Pa. 117; Walker v. Walker, 34 Ala. 469; Reed v. S., 75 Neb. 509, 106 N. W. 649.

16. C. v. Fairbanks, 2 Allen, 511; Baxter v. Abbott, 7 Gray, 71; Buckminister v. Perry, 4 Mass. 593; Hathorn v. King, 8 Mass. 371, 5 Am. D. 106; C. v. Wilson, 1 Gray, 337; S. v. Coleman, 27 La. Ann. 691; S. v. Hays, 22 La. Ann. 39. See Gehrke v. S., 13 Tex. 568.

Witness to will. A subscribing witness to a will is, alike in these and the other States, an exception to the general rule. On a question of the testator's mental condition at the time of executing it, he may give an opinion, even without prefacing it with a statement of facts. Poole v. Richardson, 3 Mass. 330; Needham v. Ide, 5 Pick. 510; Ware v. Ware, 8 Greenl. 42; Robinson v. Adams, 62 Me. 369, 16 Am. R. 473; Logan v. McGinnis, 12 Pa. 27; Titlow v. Titlow, 54 Pa. 216, 93 Am. D. 691; Gibson v. Gibson, 9 Yerg. 329; Van Huss v. Rainbolt, 2 Coldw. 139.

17. Baxter v. Abbott, supra, p. 79. See C. v. Brayman, 136 Mass. 438.

18. Vol. II, § 1179.

give to the jury, in connection with his testimony to the facts, his opinion of the mental condition.[19] Like a non-expert, he must state the facts and reasons leading to the opinion.[20] Hearsay is not a fact; therefore he cannot express an opinion made up in part from what was said to him out of court.[21] So,—

§ 684. **Hypothetical.**—Whether the expert testifies to his personal examinations or not, and though he has not seen the prisoner, he may give the results of his professional skill to aid the jury in their verdict. His conclusions do not bind them; and should they judge differently from him, their verdict is to follow, not his opinion, but their own.[22] Nor is any evidence of this kind essential to a conviction.[23]

§ 685. 1. **An Expert's Opinion**—is not admissible either to what are the facts of the case,[24] or what is the law.[25] His province extends merely to such questions of science or skill as, being within the sphere of knowledge special

19. C. v. Rogers, 7 Met. 500, 41 Am. D: 458; McAllister v. S., 17 Ala. 434, 52 Am. D. 180; In re Vanauken, 2 Stock. 186; Baxter v. Abbott, 7 Gray, 71; Lake v. P., 1 Par. Cr. 495; P. v. Lake, 2 Kern. 358; Pigg v. S., 43 Tex. 108; C. v. Rich, 14 Gray, 335, 337; S. v. Felter, 25 Iowa, 67; S. v. Hayden, 51 Vt. 296; Taylor v. S., 83 Ga. 647, 10 S. E. 442; P. v. Kemmler, 119 N. Y. 580, 24 N. E. 9; McCann v. P., 3 Par. Cr. 272; Brown v. C., 14 Bush, 398; P. v. Sliney, 137 N. Y. 570, 33 N. E. 150.

20. Clark v. S., 12 Ohio, 483, 40 Am. D. 481; Dickenson v. Barber, 9 Mass. 225, 227, 6 Am. D. 58.

21. Heald v. Thing, 45 Me. 392; Guetig v. S., 66 Ind. 94, 32 Am. R. 99. See Anderdon v. Burrows, 4 Car. & P. 210; S. v. Soper, 148 Mo. 217, 49 S. W. 1007.

22. Vol. II, 1179 (3); McAllister v. S., 17 Ala. 434, 52 Am. D. 180; Watson v. Anderson, 13 Ala. 202; Luning v. S., 1 Chand. 178, 52 Am. D. 153; Westmoreland v. S., 45 Ga. 225; In re Vanauken, 2 Stock. 186; Reed v. P., 1 Par. Cr. 481; P. v. Lake, 2 Kern. 358; C. v. Rogers, 7 Met. 500, 504, 41 Am. D. 458; Templeton v. P., 6 Thomp. & C. 81, 3 Hun, 357; Wagner v. S., 116 Ind. 181, 18 N. E. 833; Pannell v. C., 86 Pa. 260; U. S. v. Chisolm, 149 Fed. 284.

23. Reg. v. Dart, 14 Cox C. C. 143.

24. C. v. Rogers, 7 Met. 500, 505, 41 Am. D. 458.

25. Ante, § 681; S. v. Klinger, 46 Mo. 224; Walker v. Walker, 34 Ala. 469; S. v. Brown, 181 Mo. 192, 79 S. W. 1111; S. v. Roselair, 57 Ore. 8, 109 P. 865.

to him, are pertinent to what the jury will deem the facts, and the court adjudge the law, to be.[26] Yet since, at the time when he is testifying, it cannot be known what will be the jury's view of the facts, and since the court determines what ones any given evidence tends to prove,[27] the expert, when the testimony is all in, may be asked what, assuming the existence of such and such facts which the evidence tends to prove,[28] was in his opinion the mental condition of the party.[29] Strictly and in principle, this is the exact rule; but the practice will often be more or less varied to suit the convenience of the trial.[30] Thus,—

2. **When the Evidence is all in,**—if the facts are not disputed, not if they are,[31] the court in its discretion will admit the expert's opinion as to the result of the whole.[32] An approved form of the question is: "You have heard all the evidence in this case—supposing the jury to be satisfied that the facts and circumstances testified to by the other witnesses are true, what is your opinion, as a medical man, of the state of the prisoner's mind at the time of the commission of the alleged crime? Was the prisoner, in your opinion, at the time of doing the act, under any and what kind of insanity or delusion, and what would you expect

26. Vol. II, § 1179 (4).

27. Vol. II, § 978.

28. Champ v. C., 2 Met. Ky. 17, 27, 74 Am. D. 388; Stuart v. S., 1 Bax. 178, 189; Fairchild v. Bascomb, 35 Vt. 398; Ince v. S., 77 Ark. 426, 93 S. W. 65; S. v. Privitt, 175 Mo. 207, 75 S. W. 457; P. v. Koerner, 117 A. D. 40, 102 N. Y. S. 93.

29. See the cases cited to the last section, and the subsequent ones to this; P. v. Thurston, 2 Par. Cr. 49; Reed v. P., 1 Par. Cr. 481; McCann v. P., 3 Par. Cr. 272; Spear v. Richardson, 37 N. H. 23; Russell v. S., 53 Miss. 367; Davis v. S., 96 Ark. 7, 130 S. W. 574; S. v. Hyde, 234 Mo. 200, 136 S. W. 316; Duke v. S. (Tex. 1911), 134 S. W. 705; Oborn v. S., 143 Wis. 249, 126 N. W. 737.

30. Vol. II, §§ 966 (2), 966a. S. v. Murray, 83 Kan. 148, 110 P. 103; opinion based on examination of accused. S. v. Roselair, 57 Ore. 8, 109 P. 865.

31. U. S. v. McGlue, 1 Curt. C. C. 1; Coyle v. C., 104 Pa. 117.

32. Rex v. Searle, 1 Moody & R. 75. And see P. v. Aikin, 66 Mich. 460, 11 Am. St. 512, 33 N. W. 821; P. v. McElvaine, 121 N. Y. 250, 18 Am. St. 820, 24 N. E. 465; S. v. Coleman, 20 S. C. 441; Lake v. P., 1 Par. Cr. 495; Parrish v. S., 139 Ala. 16, 36 So. 1012; Green v. S., 64 Ark. 523, 43 S. W. 973; Horton v. U. S., 15 Ap. D. C. 310.

would be the conduct of a person under such circumstances?"[33] Not as of right, but only as of favor and from convenience, is this form of questioning admissible.[34] The question cannot be thus put as to a part of the evidence, the witness must have heard the whole.[35] Nor can the interrogatory be whether or not the prisoner is guilty, but what is or was his mental condition in respect of sanity

33. S. v. Windsor, 5 Harring. Del. 512, 534; s. p. C. v. Rogers, 7 Met. 500, 505. See Pannell v. C., 86 Pa. 260; P. v. Griffith 146 Cal. 339, 80 P. 68; S. v. Peel, 23 Mont. 358, 59 P. 169.

34. McNaghten's Case, 10 Cl. & F. 200; s. c. nom. McNaughten's Case, 1 Car. & K. 130, 136. Lord Chief Justice Tindall, in answer to the judges (see New Crim. Law, I, § 384, note), said, among the rest: "The question lastly proposed by your lordships is,—'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?' In answer thereto we state to your lordships that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated; because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right." P. 135 of the report in 1 Car. & K. See also P. v. Lake, 2 Kern. 358; Spear v. Richardson, 37 N. H. 23. On a trial in England before Alderson, B. and Cresswell, J. these learned persons refused to exercise the discretion thus spoken of and permit the question to be put. And Alderson, B. said to this point in McNaughten's Case: "I am quite sure that decision was wrong. The proper mode is to ask what are the symptoms of insanity, or to take particular facts and, assuming them to be true, to ask whether they indicate insanity on the part of the prisoner. To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case. The jury have the facts before them, and they alone must interpret them by the general opinion of scientific men." Reg. v. Frances, 4 Cox, C. C 57, 58.

35. P. v. Lake, supra; C. v. Rogers, 7 Met. 500; S. v. Thompson, 153 N. C. 618, 69 S. E. 254.

or insanity.[36] Nor, again, can he be asked whether he has doubts of the prisoner's sanity. He is to give opinions.[37] He may be inquired of as to the results to be deduced from such and such appearances, proved by other witnesses.[38] And on cross-examination, a considerable range of interrogation will be permitted as to what is to be inferred concerning the mental condition from specific facts.[39] Also any other queries, within the principles laid down in the first volume,[40] are competent.[41]

§ 686. Results of Reading—Books.—As seen in the first volume,[42] the expert may give to the jury the benefit of his knowledge derived, not only from experience, but also from books.[43] Yet the books themselves cannot in strictness be read to the jury, though this is sometimes done in practice.[44]

§ 687. A Witness's Competency as an Expert—is determined by the court.[45] Insanity being a disease, the judges commonly admit any practising physician;[46] sometimes

36. P. v. Thurston, supra. And see Rex v. Wright, infra.

37. Sanchez v. P., 22 N. Y. 147.

38. Rex v. Wright, Russ. & Ry. 456. And see Stephens v. P., 4 Par. Cr. 396; Perkins v. Concord Rld. 44 N. H. 223; S. v. Powell, 2 Halst. 244; Goodwin v. S., 96 Ind. 550.

39. P. v. Lake, supra; Clark v. S., 12 Ohio, 483, 40 Am. D. 481; S. v. Crowe, 39 Mont. 174, 102 P. 579; opposite party, on cross-examination may call for observed data. P. v. Faber, 199 N. Y. 256, 92 N. E. 674.

40. Vol. II, § 1179.

41. Coyle v. C., 104 Pa. 117; P. v. Osmond, 138 N. Y. 80, 33 N. E. 739.

42. Vol. II, § 1180.

43. S. v. Terrell, 12 Rich. 321.

44. C. v. Wilson, 1 Gray, 337, 338, where this is explained by Shaw, C. J., referring to Collier v. Simpson, 5 Car. & P. 73; Cocks v. Purday, 2 Car. & K. 269; 1 Greenl. Ev. § 440, note. See also Luning v. S., 1 Chand. 178, 52 Am. D. 153; S. v. O'Brien, 7 R. I. 336. Some courts permit the reading. Bales v. S., 63 Ala. 30, 38; S. v. Hoyt, 46 Conn. 330. If the book is read to the jury, still they cannot take it with them when retiring to deliberate on their verdict. S. v. Gillick, 10 Iowa, 98, 101.

45. Tullis v. Kidd, 12 Ala. 648; Parrish v. S., 139 Ala. 16, 36 So. 1012; Davis v. S., 44 Fla. 32, 32 So. 822; Clary v. S., 8 Ga. Ap. 92, 68 S. E. 615; S. v. Cole, 63 Ia. 695, 17 N. W. 183.

46. Clark v. S., 12 Ohio, 483, 40 Am. D. 481; Fairchild v. Bascomb, 35 Vt. 398; S. v. Reddick, 7 Kan. 143; Davis v. S., 35 Ind. 496, 9 Am. R. 760; Heald v. Thing, 45 Me. 392;

even an experienced nurse.[47] And sometimes they restrict the expert to the parts of the case within the particular line of his practice; for example, permit him to give opinions founded on his own observations, but not upon hypothetical facts.[48] Still, as the care of the insane has of late become almost a separate branch of the profession, the testimony of physicians not specially familiar with it is comparatively of little weight.[49] And, said a learned judge, "while the opinion of the experienced, skilful, and scientific witness, who has a competent knowledge of the facts involved in the case on which he speaks, affords essential aid to courts and juries, that of unskilful pretenders, quacks, and mountebanks, who, at times, assume the character of experts, not unfrequently serves to becloud, and lead to erroneous conclusions." [50]

§ 687 a. Thirdly. *Other Evidence*:—

1. **The Language and Conduct**—of the party are the evidence of insanity mainly relied on. And whether they are spontaneous or feigned is a question for the jury.[51]

Livingston v. C., 14 Grat. 592; S. v. Felter, 25 Iowa, 67; Kroell v. S., 139 Ala. 1, 36 So. 1025; Porter v. S., 140 Ala. 87, 37 So. 81; Wheeler v. S., 158 Ind. 687, 63 N. E. 975; Abbott v. Com., 107 Ky. 624, 55 S. W. 196, 21 Ky. L. 1372; S. v. Boyce, 74 Wash. 514, 64 P. 719; Lowe v. S., 118 Wis. 641, 96 N. W. 417; Horton v. U. S., 15 Ap. D. C. 310.

47. Fairchild v. Bascomb, 35 Vt. 398.

48. C. v. Rich, 14 Gray, 335; Russell v. S., 53 Miss. 367. And see Hook v. Stovall, 26 Ga. 704; S. v. Hinkle, 6 Iowa, 380; Emerson v. Lowell Gas Light Co., 6 Allen, 146, 83 Am. D. 621.

49. New Crim. Law, I, § 376 (4) note, par. 10; Baxter v. Abbott, 7 Gray, 71, 78; C. v. Rich, 14 Gray, 335, 336, 337.

50. Rice, J. in Heald v. Thing, 45 Me. 392, 398. And see the observations in C. v. Rogers, 7 Met. 500, 41 Am. D. 458. A physician, to be competent, need not be a graduate of a medical college. New Orleans, &c. Rld. v. Allbritton, 38 Miss. 242, 75 Am. D. 98.

51. S. v. Hays, 22 La. Ann. 39; S. v. Coleman, 27 La. Ann. 691; McKee v. P., 36 N. Y. 113; P. v. Montgomery, 13 Abb. Pr., n. s., 207; Mullins v. Cottrell, 41 Miss. 291; Jamison v. P., 145 Ill. 357, 34 N. E. 486; U. S. v. Sharp, Pet. C. C. 118; S. v. West, 1 Houst. Crim. 371. See McLeod v. S., 31 Tex. Cr. 331, 20 S. W. 749; S. v. Jones, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; S. v. Spencer, 1 Zab. 196. A singular case of successfully feigning insanity by a girl less than fourteen years old, is S. v. Doherty, 2 Tenn. 80.

Beyond this, his whole nature and history may be searched to enlighten the inquiry.[52]

2. **Into this Evidence**—will enter also the question of motive,[53] the nature of the criminal act,[54] and other considerations within the general rules of evidence.[55]. And the State may introduce in rebuttal counter proofs of the like sort.[56]

3. **Hearsay,**—or the reputation of being insane, is not admissible.[57] But it has been ruled that where the inquiry relates to the insanity of ancestors now dead, "reputation may be shown."[58]

§ 687 b. Acquitted as Insane.—Statutory proceedings for the confinement of persons acquitted because of insanity are provided for in England and most of our States. As to them, a reference to a few of the cases will suffice.[59]

52. U. S. v. Guiteau, 1 Mackey, 498, 47 Am. R. 247. See P. v. Tice, 131 N. Y. 651, 30 N. E. 494; P. v. Mortimer, 48 Mich. 37, 11 N. W. 776; Webber v. C., 119 Pa. 223, 4 Am. St. 634, 13 A. 427; Spence v. S., 15 Lea, 539; S. v. Driggers, 84 S. C. 526, 66 S. E. 1042; S. v. Rumble, 81 Kan. 16, 105 P. 1; Smedley v. Com., 139 Ky. 767, 127 S. W. 485; S. v. Porter, 213 Mo. 43, 111 S. W. 529; S. v. Crowe, 39 Mont. 174, 102 P. 579; Rice v. S., 54 Tex. Cr. 149, 112 S. W. 299; S. v. Roselair, 57 Ore. 8, 109 P. 865, as to conduct of accused after crime. Oborn v. S., 143 Wis. 249, 126 N. W. 737.

53. Reg. v. Vyse, 3 Fost. & F. 247.

54. Reg. v. Vyse, supra; Laros v. C., 84 Pa. 200.

55. P. v. Wood, 126 N. Y. 249, 27 N. E. 362; P. v. Smiler, 125 N. Y. 717, 26 N. E. 312.

56. C. v. Eddy, 7 Gray, 583.

57. Brinkley v. S., 58 Ga. 296; Foster v. Brooks, 6 Ga. 287; Walker v. S., 102 Ind. 502, 1 N. E. 856; Ashcraft v. De Armond, 44 Iowa, 229; Brinkman v. Rueggesick, 71 Mo. 553; Yanke v. S., 51 Wis. 464, 8 N. W. 276; P. v. Pico, 62 Cal. 50; S. v. Hoyt, 47 Conn. 518, 36 Am. R. 89. See Mosely v. Gordon, 16 Ga. 384; Glover v. Millings, 2 Stew. & P. 28; Mosser v. Mosser, 32 Ala. 551; Wilson v. S., 58 Tex. Cr. 593, 127 S. W. 548.

58. C. v. Andrews, Trial by Davis, 134. See Gaines v. New Orleans, 6 Wal. 642; Reed v. S., 16 Ark. 499.

59. Reg. v. Stepney Union, Law Rep. 9 Q. B. 383, 12 Cox, C. C. 631; Underwood v. P., 32 Mich. 1, 20 Am. R. 633; Bonfanti v. S., 2 Minn. 123; C. v. Meriam, 7 Mass. 168; P. v. Griffen, Edm. Sel. Cas. 126. And see Ex parte Trice, 53 Ala. 546; P. v. Lamb, 118 N. Y. S. 389; P. v. Chanler, 133 A. D. 159, 117 N. Y. S. 322.

For Intoxicating Liquors, Selling, etc., see Stat. Crimes.

CHAPTER CXXXIII.

KIDNAPPING.

Consult—for the law of this offense, with that of the kindred False Imprisonment, New Crim. Law, II, §§ 746-756a. And see the indexes to this series of books. Compare also with the title False Imprisonment, ante, §§ 365-368. For the indictment, etc., see Dir. & F., §§ 568-572.

§ 688. Between Kidnapping and False Imprisonment—the partition line is not distinct; but the former is commonly regarded as false imprisonment, aggravated by evil acts or intents the nature and extent whereof are the chief subjects of doubt.[60] As to the indictment,—

§ 689. The Facts—should be alleged; it not being adequate to charge the defendant simply, in terms, with kidnapping.[61]

§ 690. The Forms of the Indictment—are variable. Of the two in Tremaine, one charges an assault, then a battery, then a forcible carrying away of the assaulted person against her will, then a transporting of her for gain beyond seas to Virginia; and, lastly, a holding of her there, in slavery.[62] The other, with no direct allegation of assault or battery, avers that the defendants for gain conveyed and seduced a man "into a certain vessel" described, with intent to transport him beyond seas to Virginia, and there to sell and detain him for their wicked gain, etc.[63] Plainly, in strict law, the separate allegations of assault and battery and of the motive of lucre[64] are needless.[65] But—

60. New Crim. Law, II, §§ 746, 750.

61. Click v. S., 3 Tex. 282; Gossett v. S. (Tex. Cr. Ap. 1909), 123 S. W. 428.

62. Rex v. Allen, Trem. P. C. 216.

63. Rex v. Bayly, Trem. P. C. 216. And see C. v. Turner, 3 Met. 19.

64. Ante, §§ 108 (1), 274.

65. See Dir. & F., § 569.

§ 691. **Four Things.**—Practically it is best to aver a false imprisonment,[66] as consisting of assault, battery, and detention; then add, fourthly, the matter which elevates the transaction to kidnapping. Whether the latter will comprehend a transportation beyond the State depends on the pleader's view of the law.[67]

§ 692. 1. **On Statutes**—are most indictments for kidnapping, then the special concern will be to follow the statutory terms,[68] whereupon the indictment will ordinarily be good.[69] Thus,—

2. **Assault.**—Whether or not assault must be averred at the common law,[70] an indictment on a statute silent as to it need not charge it.[71] Yet in prudence the pleader will insert this allegation, so as to secure a conviction for it if the evidence should fail of proving the kidnapping. This would not render the count double.[72]

§ 693. **As to the County,**—a case was stated in "New Criminal Law."[73] The general doctrine is explained in the first volume of this work.[74]

§ 694. **The Intent**—sometimes, as where the person kidnapped is of immature years, may require special inquiry. The facts are for the jury.[75] On an indictment for help-

66. Ante, § 365.

67. New Crim. Law, II, § 750 (4). For the elements of the crime under various statutes. P. v. Black, 147 Cal. 426, 81 P. 1099; Boes v. S., 125 Ind. 205, 25 N. E. 218; S. v. Leuth, 128 Iowa, 189, 103 N. W. 345; S. v. Rhoades, 29 Wash. 61, 69 P. 389; Biggs v. S., 13 Wyo. 94, 77 P. 901.

68. Hamilton v. C., 3 Pa. (P. & W.) 142; S. v. Griffin, 3 Harring. (Del.) 559.

69. S. v. McRoberts, 4 Blackf. 178; S. v. Leuth, 128 Iowa, 189, 103 N. W. 345; S. v. Holland, 120 La. 429, 45 So. 380. Indictment under a statute must allege child had no parent or guardian. Sutton v. S., 122 Ga. 158, 50 S. E. 60. "Feloniously" not required. S. v. Holland, 120 La. 429, 45 So. 380.

70. Ante, §§ 366, 691.

71. C. v. Turner, 3 Met. 19, 26; Whart. Prec. (2d Ed.) pl. 199.

72. P. v. Ah Own, 39 Cal. 604; C. v. Nickerson, 5 Allen, 518. See C. v. Westervelt, 11 Phila. 461.

73. S. v. Whaley, 2 Harring. Del. 538; New Crim. Law, II, § 756.

74. Vol. I, § 45 et seq.; and see particularly, §§ 54-59.

75. Oliver v. S., 17 Ala. 587; Vol. II, § 1101; Gould v. S., 71 Neb. 651, 99 N. W. 541.

ing a third person to kidnap, his reputation as a kidnapper was admitted to the intent.[76]

§ 695. 1. **A Father**—being indicted for kidnapping his own child committed to the mother in a decree of divorce, "proof that the child had affection for the father was rightfully rejected, as it would have no legitimate bearing upon the issue of guilty or not guilty." [77]

2. **Connected with Slavery**—are cases now only of illustrative importance.[78]

76. S. v. Harten, 4 Harring. Del. 582. See P. v. Fick, 89 Cal. 144, 26 P. 759.

77. S. v. Farrar, 41 N. H. 53, 59, opinion by Bellows, J. The child kidnapped may testify she would not have gone except for the inducements of accused. Gould v. S., 71 Neb. 651, 99 N. W. 541.

78. S. v. Whitaker, 3 Harring. Del. 549; S. v. Griffin, 3 Harring. Del. 559; Wheeler v. S., 23 Ga. 292; S. v. Harten, 4 Harring. Del. 582; Davenport v. C., 1 Leigh, 588; S. v. Rector, 11 Mo. 29.

For Labor Offenses, see New Crim. Law, and Dir. & F.

CHAPTER CXXXIV.

LARCENY, AS TO THE INDICTMENT.

Consult—for the law of this offense, New Crim. Law, II, §§ 757-904; Stat. Crimes, §§ 409-429. For the indictment, etc., Dir. & F., §§ 581-616. See also the indexes to this series of books.

§ 696. 1. **This Chapter**—covers only the indictment for simple larceny; leaving the evidence, practice, and compound larcenies for the three chapters next following.

2. **How divided.**—We shall consider, I. The Indictment in General; II. The Description of the Stolen Property; III. The Allegation of Value; IV. The Allegation of Ownership; V. The Allegations where Goods are stolen in one Jurisdiction and carried into another; VI. The Indictment upon Statutes.

I. *The Indictment in General.*

§ 697. 1. **The Form of the Indictment**—is at common law practically the same under all varying facts, and from generation to generation, having been transmitted to us from early times. It is that on, etc., at, etc., the defendant such and such articles of personal property, enumerated, with their several values, "of the goods and chattels of one X, then and there being found, feloniously did steal, take, and carry away." [79]

79. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 169; Dir. & F., §§ 582, 583. Hale says: "The indictment runs vi et armis felonice furatus fuit, cepit et asportavit in case of dead chattels, cepit et abduxit in

2. "**Found,**"—common in the forms, is not necessary.[80] And the same has been adjudged of the entire phrase "then and there being found."[81]

§ 698. 1. "**Steal,**" **etc.**—Properly and strictly "steal" is indispensable. And so perhaps, but not so certainly, is "take." But "carry away," "lead away," and "drive away," are each probably unnecessary where the word "steal" is employed; for it includes their meaning.[82] And there are cases holding that even "steal" may be supplied by other terms conveying the same idea,[83]—an experiment not prudent to employ.

2. "**From the Possession**"—of the owner unnecessary.[84]

case of a horse, excepit et effugavit in case of sheep, cows, etc., wherein the words felonice furatus fuit, cepit, are essential to the crime." 1 Hale, P. C. 504. And see, for forms, S. v. Newton, 42 Vt. 537; S. v. Matthews, 20 Mo. 55; S. v. Leavitt, 66 Me. 440; Yates v. S., 67 Ga. 770; S. v. Graham, 65 Iowa, 617, 22 N. W. 897. And see P. v. Strong, 46 Cal. 302; P. v. Brown, 27 Cal. 500; S. v. Mann, 25 Ohio St. 668; McMullen v. S., 53 Ala. 531; Hall v. S., 53 Ala. 634; Henry v. S., 45 Tex. 84; Wilcox v. S., 45 Tex. 146; P. v. Smith, 15 Cal. 408; S. v. Hinckley, 4 Minn. 345; S. v. Jones, 7 Nev. 408; P. v. Phelps, 49 How. Pr. 437; Phelps v. P., 72 N. Y. 334; S. v. Johnson, 30 La. Ann. 305; Reg. v. Lyons, 9 Car. & P. 555; Wedge v. S., 7 Lea, 687; Gregg v. S., 64 Ind. 223; P. v. Ho Sing, 6 Cal. Ap. 752, 93 P. 204; S. v. DeLuca (Del. Gen. Sess.), 77 A. 742; P. v. Miller, 169 N. Y. 339, 62 N. E. 418. Carrying away need not be alleged. Com. v. McDonald, 127 Mass. 581, 73 N. E. 852. See, also, S. v. Perry, 94 Ark. 215, 126 S. W. 717.

80. Dir. & F., § 582.

81. S. v. Sparrow, N. C. Term R. 93. And see Maynard v. S., 46 Ala. 85; Sallie v. S., 39 Ala. 691; S. v. Gallimore, 7 Ire. 147; Irvin v. S., 37 Tex. 412; S. v. Mann, 25 Ohio St. 668.

82. Ante, § 697, note; In re Leddy, 11 Mich. 197; S. v. Mann, 25 Ohio St. 668. And see Spittorff v. S., 108 Ind. 177, 8 N. E. 911. But see Rountree v. S., 58 Ala. 381; S. v. Perry, 94 Ark. 215, 126 S. W. 717; Com. v. McDonald, 187 Mass. 581, 73 N. E. 852. It must be alleged at common law that the carrying away was without the owner's consent. P. v. Dilcher, 16 N. Y. Cr. 547, 38 Misc. 89, 77 N. Y. S. 108. See, Chazem v. S., 56 Neb. 496, 76 N. W. 1056.

83. Damewood v. S., 1 How. (Miss.) 262; Engleman v. S., 2 Ind. 91, 52 Am. D. 494; S. v. Yan Yan, 10 Ore. 365. See Wills v. S., 4 Blackf. 457; Musquez v. S., 41 Tex. 226; Hall v. S., 41 Tex. 287; Austin v. S., 42 Tex. 345; Walklate v. Com. (Ky. 1909), 118 S. W. 314.

84. Thompson v. C., 2 Va. Cas. 135; P. v. Hutchings, 8 Cal. 550, 97

§ 698 a. **The Ulterior Intent,**—often called the *animus furandi,*[85] is a predominant element in larceny. And a every offense the indictment must allege as well the criminal intent as the act, though not unfrequently the former is involved in the averment of the latter.[86] So that in principle the foregoing form for larceny is inadequate unless the intent is sufficiently implied either in "steal"[87] or in "feloniously,"[88] or in both. And doubtless it should be;[89] yet if the question were new, this solution of it would hardly bear examination.

§ 698 b. **What is One Offense,**—to be charged in one count, is considered in "New Criminal Law."[90] It requires careful attention, but repetitions are unnecessary.

II. *The Description of the Stolen Property.*

§ 699. 1. **To Individualize the Transaction,**[91]—the indictment must with reasonable certainly state what was stolen; as, it does not suffice simply to say it was the "goods," or "goods and chattels," of one named. The species, or names of the articles, and their number must be given.[92]

P. 325; P. v. Cleary, 1 Cal. Ap. 52, 81 P. 753. See Trafton v. S., 5 Tex. Ap. 480. Contra, Henley v. S. (Tex. Cr. Ap. 1911), 135 S. W. 133.

85. New Crim. Law, I, §§ 342; II, §§ 758, 840-842 et seq.

86. Vol. II, §§ 521-525; S. v. Posey, 88 S. C. 313, 70 S. E. 612; Barbe v. Ter., 19 Okla. 119, 91 P. 783.

87. Ante, § 698 (1).

88. New Crim. Law, II § 840. "Feloniously" may be omitted in petty larceny. S. v. Minnick, 54 Ore. 86, 102 P. 605; S. v. Boyce, 65 Ark. 82, 44 S. W. 1043; Baldwin v. S., 46 Fla. 115, 35 So. 220; S. v. Smith, 31 Wash. 245, 71 P. 767.

89. See S. v. Hackett, 47 Minn. 425, 50 N. W. 472; P. v. McLaughlin, 126 N. Y. S. 177.

90. New Crim. Law, II, § 888; S. v. Wagner, 118 Mo. 626, 24 S. W. 219; Joslyn v. S., 128 Ind. 160, 25 Am. St. 425, 27 N. E. 492; Holles v. U. S., 3 MacAr. 370, 36 Am. R. 106; S. v. Warren, 77 Md. 121, 39 Am. St. 401, 26 A. 500; Cooper v. S., 79 Ind. 206; Waters v. P., 104 Ill. 544; P. v. Town, 53 Mich. 488, 19 N. W. 158.

91. Vol. II, § 526.

92. Ib. §§ 575, 576; 2 East P. C. 777, 778; S. v. Longbottoms, 11 Humph. 39; Williams v. S., 5 Tex. Ap. 116, 118; Walthour v. S., 114 Ga. 75, 39 S. E. 872; Lindsey v. S., 9 Ga. Ap. 299, 70 S. E. 1114; Young v. P., 193 Ill. 236, 61 N. E. 1104; S. v. Moxley, 41 Mont. 402, 110 P. 83; S. v. Bailey, 63 W. Va. 668, 671,

2. **Property.**—It is customary to add "of the goods and chattels" of the person stated to be the owner;[93] and we have intimations that such declaring of them to be "goods and chattels" is essential.[94] But to require it would be contrary to principle,[95] and so equally it is to authority.[96] Hence it is not ill to say, of the "property" of, instead of "goods" of; though not all property is the subject of larceny, while all goods are.[97] Now,—

§ 700. 1. **The Description of the Thing stolen,**—assuming the value and ownership to be well laid, may be by any of such several expressions as: "One sheep,"[98] "a horse,"[99] "a certain mare,"[1] "one certain hog,"[2] "a certain yellow and white pied beef steer,"[3] "one cow" (under which words the State may prove the animal's

60 S. E. 785; Clark v. S., 59 Fla. 915, 52 So. 518; Ayers v. S., 3 Ga. Ap. 305, 59 S. E. 924.

93. For the form, see ante, § 697 (1).

94. 2 East ut sup.; referring to Long's Case, Cro. Eliz. 489, 490.

95. Ante, §§ 39, 139, 414, 415, 439.

96. Dir. & F., § 582; Reg. v. Radley, 1 Den. C. C. 450, 451, 2 Car. & K. 974, 3 Cox C. C. 460; S. v. Bayonne, 36 La. Ann. 761.

97. S. v. Odum, 11 Tex. 12; McBride v. C., 13 Bush, 337; Jones v. S., 51 Miss. 718.

Surplusage. If the words "goods and chattels" are employed when the thing is not such, they may be rejected as surplusage. Eastman v. C., 4 Gray, 416, 418; Reg. v. Radley, supra; Rex v. Morris, 1 Leach, 468; Brown v. S., 88 Neb. 411, 129 N. W. 545; Ter. v. Valles, 15 N. M. 228, 103 P. 984.

98. Rex v. Stroud, 6 Car. & P. 535; S. v. Pollard, 53 Me. 124; Mizell v. S., 38 Fla. 20, 20 So. 769.

99. McBride v. C., 13 Bush, 337; Wiley v. S., 3 Coldw. 362. And see P. v. Smith, 15 Cal. 408; S. v. Hill, 65 Mo. 84; Taylor v. S., 44 Ga. 263; S. v. Brinkley, 55 Ore. 134, 104 P. 893; S. v. Blair, 63 W. Va. 635, 60 S. E. 795; "two head of neat cattle," S. v. Mumford, 70 Kan. 858, 79 P. 669; and see S. v. DeWitt, 152 Mo. 76, 53 S. W. 429; Mathews v. S., 41 Tex. Cr. 98, 51 S. W. 915.

1. Soria v. S., 2 Tex. Ap. 297; S. v. Friend, 47 Minn. 449, 50 N. W. 692; S. v. Rathbone, 8 Idaho, 161, 67 P. 186; S. v. Shuck, 38 Wash. 270, 80 P. 444.

2. Grant v. S., 2 Tex. Ap. 163; S. v. Mansfield, 33 Tex. 129; Washington v. S., 58 Ala. 355. See Brown v. S., 44 Ga. 300; Lavender v. S., 60 Ala. 60.

3. Robertson v. S., 1 Tex. Ap. 311. And see Moore v. S., 2 Tex. Ap. 350; Hubotter v. S., 32 Tex. 479; S. v. Garrett, 34 Tex. 674; Short v. S., 36 Tex. 644.

color and description),[4] "one watch,"[5] "one bolt of domestic, made of cotton,"[6] "a parcel of oats"[7] (a form not to be commended), "one hide,"[8] "one bull tongue" (being the name of a peculiarly shaped ploughshare),[9] "one pair of buck-skin gloves" (but not proved by evidence that they were of sheepskin),[10] "a pair of pants,"[11] "six towels,"[12] "fifty pounds of flour,"[13] "one feather bed,"[14] "a book."[15] On the other hand,—

2. **Not sufficiently Specific**—has been adjudged to be the charge of stealing "meat" (thus, "one pound of meat"; because the term "applies, not only to the flesh of all animals used for food, but in a general sense to all kinds of provisions."[16] Also, "one certain trunk or chest, containing various articles of clothing, jewelry," etc.;[17] also, "one case of merchandise;"[18] also, "ninety-three railroad tickets;"[19] also, "goods and lawful money of the United States commonly called greenbacks."[20]

4. Johnson v. S., 1 Tex. Ap. 118; P. v. Winkler, 9 Cal. 234; Ter. v. Valles, 15 N. H. 228, 103 P. 984; P. v. Machado, 130 Cal. XVII, 63 P. 66; Peeples v. S., 46 Fla. 101, 35 So. 223; Wilburn v. S., 38 Fla. 20, 20 So. 769.

5. Williams v. S., 25 Ind. 150; Patterson v. S., 122 Ga. 587, 50 S. E. 489.

6. S. v. Odum, 11 Tex. 12.

7. S. v. Brown, 1 Dev. 137, 17 Am. D. 562. So it has been held; but contra, Reg v. Bonner, 7 Cox C. C. 13. As to "corn in the ear," see C. v. Pine, 2 Pa. (Law Jour. Rep.) 154.

8. S. v. Dowell, 3 Gill & J. 310.

9. S. v. Clark, 8 Ire. 226.

10. McGee v. S., 4 Tex. Ap. 625.

11. S. v. Johnson, 30 La. Ann. 904.

12. C. v. Lavery, 101 Mass. 207.

13. S. v. Harris, 64 N. C. 127 "four barrels of whiskey," S. v. Bailey, 63 W. Va. 668, 671, 60 S. E. 785.

14. S. v. Parker, 47 Vt. 19. "And."—When several articles are enumerated, the connecting "and" between them is not essential. S. v. Bartlett, 55 Me. 200.

15. S. v. Logan, 1 Mo. 532; Turner v. S., 102 Ind. 425, 1 N. E. 869.

16. S. v. Patrick, 79 N. C. 655, 28 Am. R. 340; S. v. Morey, 2 Wis. 494, 60 Am. D. 439.

17. Potter v. S., 39 Tex. 388. See also Castello v. S., 36 Tex. 324; Stollenwerk v. S., 55 Ala. 142.

18. S. v. Dawes, 75 Me. 51.

19. McCarty v. S., 1 Wash. 377, 22 Am. St. 152, 25 P. 299.

20. S. v. Cason, 20 La. Ann. 48. And see Croker v. S., 47 Ala. 53; Merwin v. P., 26 Mich. 298, 12 Am. R. 314; Johnson v. S., 32 Ark. 181. "Three head of cattle," not specifying the species, has been held suffi-

§ 701. **Sufficiently English**[21]—is barilla.[22]

§ 702. **The Object of the Description**—of the things stolen is to individualize the transaction,[23] and enable the court to see that they are, in law, the subjects of larceny.[24] Otherwise the indictment will not, as it should, disclose a *prima facie* case.[25] Likewise, it has been said, the jury should be able to see that the articles proved are the same which the indictment mentions.[26] But this would be too strict a rule for practical use, and the cases show that it is not observed;[27] though, of course, *variance* between description and proof would be fatal.[28] The description should be simply such as, in connection with the other allegations, will affirmatively show the defendant to be guilty, will reasonably inform him of the instance meant, and put him in a position to make the needful preparations to meet the charge. Within which rule,—

§ 703. **Coin**—should be individualized by the number of pieces and their respective denominations and kinds;[29] though perhaps sometimes slight modifications of this rule will be suffered.[30] It is good to say, "two five frank pieces, silver coin of France, of the value, etc.; and seven half dollars, silver coin of the United States, of the value,

ciently certain under the California statute. P. v. Littlefield, 5 Cal. 355. But see Vol. I, § 568.

21. Vol. I, § 340 et seq.

22. C. v. James, 1 Pick. 375.

23. Ante, § 699.

24. P. v. Jackson, 8 Barb. 637; Reg. v. Lowrie (Law Rep.), 1 C. C. 61, 65; Jones v. S., 51 Miss. 718.

25. Vol. I, § 326; Vol. II, §§ 513, 519; post, § 787.

26. Vol. II, § 576; P. v. Jackson, supra.

27. Grant v. S., 2 Tex. Ap. 163, 166; C. v. Brettun, 100 Mass. 206, 207, 97 Am. D. 95; S. v. Logan, 1 Mo. 532.

28. Post, § 710; Morgan v. S., 61 Ind. 447; Turner v. S., 3 Heisk. 452; Courtney v. S., 3 Tex. Ap. 257.

29. S. v. Longbottoms, 11 Humph. 39; S. v. Murphey, 6 Ala. 845; Lord v. S., 20 N. H. 404, 51 Am. D. 231; Lavarre v. S., 1 Tex. Ap. 685.

30. Miller v. P., 21 Hun, 443; S. v. Monroe, 30 La. Ann. 1241; Reed v. S., 88 Ala. 36, 6 So. 840; P. v. Freeman, 1 Idaho, n. s. 322. See Williams, v. S., 5 Tex. Ap. 116. As by statute dispensing with a description of the kind of money. S. v. Fogerty, 105 Iowa, 32, 74 N. W. 754.

etc. current[31] money."[32] And in one case, the expression "sixty dollars of the current gold coin of the United States" was adjudged adequate, by interpreting it to mean sixty one-dollar gold pieces.[33] This is pushing the rule to construe ambiguities in a way sustaining the indictment[34] quite as far as, in reason, it will bear. On the other hand, simply to state the subject of the larceny as so many dollars, or so many dollars in money, without further particularization, is, by all, deemed ill.[35]

§ 704. **In Reason,**—the description of the coins should fairly call to mind what ones they were, thus identifying them;[36] but the words, particulars, images, and the like, found on them, need not be stated. Thus, in England, "two pieces of the current silver coin of the realm, called shill-

31. That the word "current" is unnecessary, see P. v. Green, 15 Cal. 512; C. v. Gallaher, 16 Gray, 240. " Lawful money of the United States" not necessary, P. v. Winkler, 9 Cal. 234. If it be alleged that the money is "current" or "lawful money of the United States it may have to be proved to be such. Snelling v. S., 57 Tex. Cr. 416, 123 S. W. 610; Rogers v. S., 58 Tex. Cr. 146, 124 S. W. 921; Maxey v. S., 58 Tex. Cr. 118, 124 S. W. 927.

32. S. v. Evans, 7 Gill & J. 290. To the like effect, Barker v. S., 48 Ind. 163, following Terry v. S., 13 Ind. 70.

33. McKane v. S., 11 Ind. 195. Of a like sort is C. v. Gallaher, 16 Gray, 240. Compare with Lavarre v. S., supra; P. v. Green, 15 Cal. 512.

34. Vol. II, § 510.

35. S. v. Longbottoms, supra; Barton v. S., 29 Ark. 68; Brown v. P., 29 Mich. 232; P. v. Ball, 14 Cal. 101, 73 Am. D. 631; Leftwich v. C., 20 Grat. 716. But see C. v. Gallagher, 16 Gray, 240. Contra, in Ohio and Louisiana, by force of the statute. McDivit v. S., 20 Ohio St. 231; S. v. Walker, 22 La. Ann. 425; S. v. Shonhausen, 26 La. Ann. 421; S. v. Green, 27 La. Ann. 598; S. v. Carro, 26 La. Ann. 377. See Merwin v. P., 26 Mich. 298, 12 Am. R. 314; Grant v. S., 55 Ala. 201; Jones v. C., 13 Bush, 356; McEntee v. S., 24 Wis. 43; S. v. Kroeger, 47 Mo. 530; C. v. O'Connell, 12 Allen, 451; S. v. Fulford, Phillips, N. C. 563; Sallie v. S., 39 Ala. 691; S. v. Evans, 15 Rich. 31; Randall v. S., 132 Ind. 539, 32 N. E. 305. Except when allowed by a statute, Cook v. S., 80 Ark. 495, 97 S. W. 683; Frederick v. S., 127 Ga. 35, 55 S. E. 1044; Dalton v. S., 50 Tex. Cr. Ap. 523, 98 S. W. 855; Diaz v. S. (Tex. 1911), 137 S. W. 377; Campbell v. S. (Tex. Cr. Ap. 1911), 135 S. W. 548.

36. Rex v. Fry, Russ. & Ry. 482.

ings, of the value of," etc. is good,[37] it is the common form. The doctrine in these two sections assumes that the full description is or may be [38] known to the grand jury. But—

§ 705. **Unknown.**—Often the victim of theft cannot minutely describe the stolen coin or bills. Then, within limits not well defined, the grand jury may transfer to the indictment such a description as the witnesses can furnish, and allege that the further particulars are to them unknown.[39] It was good to say "sundry gold coins, current as money in this Commonwealth, of the aggregate value of twenty-nine dollars, but a more particular description of which the jurors cannot give, as they have no means of knowledge." [40]

§ 706. 1. **Wild Animals.**—As already appears,[41] animals tame in their natures are in the indictment designated similarly to inanimate things. But since the allegations must disclose a *prima facie* offense,[42] if the animal stolen is "*ferae naturoe,* the indictment," says East, "must show it to be dead, tame, or confined, in which state it may be the subject of individual property." [43] Thus,—

2. **To say One stole a "Pigeon"**—charges no offense; because, *prima facie,* the bird is wild, and is not the subject of larceny. But with the prefix "tame," the averment will be good.[44]

37. Reg. v. Radley, 1 Den. C. C. 450, 451, 2 Car. & K. 974, 3 Cox C. C. 460.

38. Vol. II, §§ 549, 550.

39. Ib. §§ 493-495, 546-553; Brown v. P., 29 Mich. 232; Hamilton v. S., 60 Ind. 193, 28 Am. R. 653; Lavarre v. S., 1 Tex. Ap. 685; Ware v. S., 2 Tex. Ap. 547. See Carden v. S., 89 Ala. 130, 7 So. 801; Ray v. S., 4 Ga. Ap. 67, 60 S. E. 816; Leonard v. S., 115 Ala. 80, 22 So. 564; S. v. Williams, 118 Iowa, 494, 92 N. W. 652; S. v. Burks, 150 Mo. 568, 60 S. W. 1100; Berry v. S., 46 Tex Cr. 420, 80 S. W. 630.

40. C. v. Sawtelle, 11 Cush. 142, 143. Cases like this are P. v. Bogart, 36 Cal. 245; Cook v. S., 4 Tex. Ap. 265; Du Bois v. S., 50 Ala. 139; C. v. Grimes, 10 Gray, 470, 71 Am. D. 666; S. v. Taunt, 16 Minn. 109; Hart v. S., 55 Ind. 599.

41. Ante, § 700 (1).

42. Ante, § 702.

43. 2 East P. C. 777; Rex v. Rough, 2 East P. C. 607; Rex v. Hundsdon, 2 East P. C. 611. See Reg. v. Roe, 11 Cox C. C. 554; Reg. v. Strange, 1 Cox C. C. 58; S. v. Shutts, 69 N. J. L. 206, 54 A. 235.

44. Reg. v. Cheafor, 2 Den. C. C. 361, 5 Cox C. C. 367, 15 Jur. 1065.

3. "**Turkey,**"—though we have wild turkeys, seems to indicate the domestic fowl.[45] So that "one turkey" has been accepted in allegation.[46]

§ 707. 1. "**Three Eggs,**"—not saying of what species, was, by Tindal, C. J. ruled to be inadequated; because "for aught that appears" they "might have been adder's eggs, or some other species of eggs which cannot be the subject of larceny."[47] So—

2. "**Five Fish**"—was deemed fatally defective; unless something were added or prefixed to indicate that they were dead, reclaimed, or otherwise in a condition to be the subjects of larceny.[48]

3. "**Eighteen Bushels of Oysters**"—was adjudged sufficient; because, said Green, C. J. though they are usually classed with animals *ferae nature,* they "do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals."[49]

§ 708. **Dead or Alive.**—To give simply the name of the animal signifies that it alive; and proof of a dead one will not satisfy the allegation.[50] It is the same of a bird; for example, partridge.[51] Nor, *a fortiori,* if the partridge is charged as dead, will proof of a live one suffice.[52]

§ 709. "**Ham**"—denotes the part of a dead animal; it could not be stolen out of a live one, so is good in allegation.

45. New Crim. Law, II, § 774.

46. S. v. Turner, 66 N. C. 618; Skelton v. S., 149 Ind. 641, 49 N. E. 901.

47. Reg. v. Cox, 1 Car. & K. 494.

48. S. v. Krider, 78 N. C. 481. See Rex v. Hundsdon, 2 East P. C. 611.

49. S. v. Taylor, 3 Dutcher, 117, 119, 72 Am. D. 347.

50. C. v. Beaman, 8 Gray, 497; S. v. Jenkins, 6 Jones, N. C. 19; Rex v. Edwards, Russ. & Ry. 497. If we assume Rex v. Puckering, 1 Moody, 242, to be correctly reported, its consistency with the foregoing cases and the doctrine of the text is not quite plain, yet it does not seem to overrule anything. Paulk v. S., 5 Ga. Ap. 567, 63 S. E. 659; Commonwealth v. Beaman, 8 Gray (Mass.), 497, 499; Rex v. Halloway, 1 C. & P. 127.

51. Rex v. Rough, 2 East P. C. 607.

52. Reg. v. Roe, 11 Cox C. C. 554.

It is the same of "boar's head." Said Patteson, J.: "Do you find in works on natural history that there is any living animal called a ham?" [53]

§ 710. 1. **Variance**—must be avoided; as,—

2. "**Pair of Boots,**"—though not ill in itself, is not sustained by proof of the larceny of the right boot of each of two pairs.[54] Again,—

3. "**Bottles" of Whiskey**—are not proved by a showing that the defendant filled his own bottles by drawing the liquor from casks.[55] So,—

4. **A "Woollen" Sheet**—is one "composed wholly of wool;" and it is not proved where the warp of the article is cotton and the filling is wool.[56]

5. **A "Plough"**—is not stolen where the thing proved is only a ploughshare.[57]

6. **A "Shovel-Plough,"**—being charged as stolen, and the proof being that the defendant took only the iron part, it was held that the jury should decide whether, according to common understanding, the thing was a shovel-plough.[58] In like manner,—

7. **A Set of New Handkerchiefs**—in a piece, not separated, may be described as so many handkerchiefs, if so known in trade.[59] Likewise—

8. "**Pounds,"—as, "fifty pounds of flour,"**—is good in allegation. And it is sustained by proof of quanties known also by some other name.[60]

53. Reg. v. Gallears, 1 Den. C. C. 501, 502.

54. S. v. Harris, 3 Harring. (Del.) 559.

55. C. v. Gavin, 121 Mass. 54, 23 Am. R. 255.

56. Alkenbrack v. P., 1 Denio, 80.

57. S. v. Cockfield, 15 Rich. 316; "brass" alleged, copper proved, S. v. Shapiro, 216 Mo. 359, 115 S. W. 1022.

58. S. v. Sansom, 3 Brev. 5. See also S. v. Moore, 11 Ire. 70; U. S. v. Hardyman, 13 Pet. 176; U. S. v. Burroughs, 3 McLean, 405.

59. Rex v. Nibbs, 1 Moody, 25.

60. S. v. Harris, 64 N. C. 127; Reg v. Mansfield, Car. & M. 140. See further on this general question, Wein v. S., 14 Mo. 125; S. v. Gilbert, 13 Vt. 647, 651.

§ 711. **Variance for Court or Jury.**—Thus we see that sometimes the question of variance is submitted to the jury under instructions. In principle, it is believed to be in general properly so in this class of cases.[61]

§ 712. 1. **Less proved than Alleged.**—Since a count may charge the larceny of more articles than one, it is not thereby made double.[62] Then if there is no needless entanglement in the allegation, it will be sustained by proof of any part of the things[63] the value whereof satisfies the requirements of the law.[64] Or if a part are inadequately described, there may be a conviction as to those whereof the description is sufficient.[65]

2. **If More Articles**—are proved than are charged, the surplusage of proof is simply without effect. The conviction can be as broad as the allegation, but no broader.[66]

III. *The Allegation of Value.*

§ 713. 1. **Why and when.**—This allegation is not, like the description of the property[67] and its ownership,[68] made to identify the transaction, but to indicate the degree of criminality and the consequent punishment.[69] Hence it is required simply when the kind or extent of punishment depends on it,[70] otherwise when it does not.[71] Thus,—

61. Ante, § 460 (5); 1 Greenl. Ev. §§ 49, 277; 2 Ib. § 490.

62. S. v. Cameron, 40 Vt. 555.

63. S. v. Johnson, 3 Hill, S. C. 1.

64. Vol. II, § 488b (2); Raines v. S., 42 Fla. 141, 28 So. 571; Edson v. S., 148 Ind. 283, 47 N. E. 625; Jones v. S. (Tex. 1898), 44 S. W. 162.

65. C. v. Eastman, 2 Gray, 76; Gibson v. S., 114 Ga. 34, 39 S. E. 948.

66. Jackson v. S., 14 Ind. 327.

67. Ante, § 699.

68. Vol. II, §§ 488b (3), 581.

69. Ib., §§ 488b (2), 540 (2), 567.

70. Ib., § 77 et seq.; ante, § 565 and places there referred to, 572. Gerard v. S., 10 Tex. Ap. 690; P. v. Belcher, 58 Mich. 325, 25 N. W. 303; Johnson v. S. (Tex. Cr. Ap. 1909), 122 S. W. 877; Chestnut v. P., 21 Colo. 512, 42 P. 656; S. v. Faulk, 22 S. D. 183, 187, 116 N. W. 72; P. v. Rice, 73 Cal. 220, 14 P. 851; S. v. Moxley, 41 Mont. 402, 409, 110 P. 83. As to reconciling inconsistent allegations of value. P. v. Whitman, 243 Ill. 471, 90 N. E. 924; Sullivan v. Ter., 8 Okla. 499, 58 P. 650.

71. Vol. II, §§ 540 (2), 541; S. v. Gossett, 9 Rich. 428; S. v. Chaney, 9 Rich. 438; Johnson v. S., 29 Tex. 492; S. v. Daniels, 32 Mo. 558; P. v.

2. **Where there are Two Degrees of Larceny,**—grand and petit, distinguished by the value of the things stolen,[72] the indictment must state the value, that the degree may appear.[73] And it is the same in all other larcenies the punishment for which depends on value.[74] So that—

3. **Rule general.**—Though in modern times we have left but little of the distinction between grand and petit larceny, most of our statutes regulate the punishment for larceny by the value stolen. Hence the doctrine is often expressed in general terms that an indictment for larceny must allege the value.[75] But—

4. **In Statutory Horse-stealings,**—and other like larcenies of specific things, where the punishment in no degree depends on the value, it need not be averred;[76] or, if averred, it need not be proved.[77]

§ 714. 1. **In Form,**—it is both practically best and usual to add the allegation of value to that of each specific article; or, what is the same thing, to say, if there are several articles of a kind, so many, each of the value of so much.[78] Thereupon, if any one is inadequately laid, or is found not to be the subject of larceny, or is not proved, the averment as to it alone may be rejected; or, if the jury do not deem the value of each to be as alleged, they may diminish any one or all in their finding; and, in any case,

Higbie, 66 Barb. 131; Mizell v. S., 38 Fla. 20, 20 So. 769; Baldwin v. S., 46 Fla. 115, 35 So. 220; Woodring v. Ter., 14 Okla. 250, 78 P. 85.

72. New Crim. Law, I, § 679; II, § 884.

73. Rex v. Peel, Russ. & Ry. 407; Reg. v. Gamble, 16 M. & W. 384. The indictment need not otherwise designate the larceny as grand or petit. S. v. Powell, 28 La. Ann. 315; S. v. Lartigue, 29 La. Ann. 642; Turner v. S., 124 Ala. 59, 27 So. 272.

74. Meyer v. S., 4 Tex. Ap. 121.

75. Vol. II, § 541; Hope v. C., 9 Met. 134; Wilson v. S., 1 Port. 118; C. v. Lavery, 101 Mass. 207; Boyle v. S., 37 Tex. 359; C. v. Smith, 1 Mass. 245; S. v. Wagner, 118 Mo. 626, 24 S. W. 219.

76. Vol. II, § 541; Stat. Crimes, § 427; Gregg v. S., 55 Ala. 116; Adams v. C., 23 Grat. 949; Adams v. S., 60 Ala. 52; P. v. Townsley, 39 Cal. 405.

77. Davis v. S., 40 Tex. 134; Beard v. S., 45 Tex. Cr. 522, 78 S. W. 348.

78. 3 Chit. Crim. Law, 959a et seq.; S. v. En, 10 Nev. 277.

the proceeding will be sustained.[79] Still, the indictment will be good in law if it states simply the aggregate value.[80] And if the proof corresponds to the allegation throughout, there may be a valid general verdict of guilty.[81] But—

2. **Practically**—this alleging an aggregate value is objectionable, since it requires the proof of all as laid.[82] Thus, if it is charged that the defendant stole six towels of the value of one dollar, and it is proved that he stole three of the value of fifty cents, there can be no conviction; because, for aught appearing, the grand jury deemed the unproven three to be worth the one dollar and the proven three nothing. There would remain, as to value, no allegation to support the verdict.[83] So, should the petit jury find the defendant guilty of stealing a particular article, not assessing its value, and not guilty of stealing the others, this would not support a judgment against him; because of the double reason that neither in the averments nor in the verdict does the value of the thing appear.[84] But where the combined value is thus simply reduced, yet not below the sum required by the statute for the punishment to be inflicted,[85] the verdict and judgment thereon will be good.[86] Again,—

79. Doyle v. S., 4 Tex. Ap. 253; S. v. Merrill, 44 N. H. 624.

80. Doyle v. S., supra; S. v. Hart, 29 Iowa, 268; Meyer v. S., 4 Tex. Ap. 121; S. v. Murphy, 8 Blackf. 498; Clifton v. S., 5 Blackf. 224; S. v. Buck, 46 Me. 531; S. v. Hood, 51 Me. 363; S. v. Brew, 4 Wash. 95, 31 Am. St. 904; Jackson v. S., 69 Ala. 249; S. v. Beatty, 90 Mo. 143, 2 S. W. 215; S. v. Koplan, 167 Mo. 298, 66 S. W. 967; Bone v. S., 120 Ga. 866, 48 S. E. 356; Edson v. S., 148 Ind. 283, 47 N. E. 625; S. v. O'Connell, 144 Mo. 387, 46 S. W. 175.

81. S. v. Hood, supra; Ware v. S., 2 Tex. Ap. 547; C. v. Sawtelle, 11 Cush. 142.

82. Rex v. Forsyth, Russ. & Ry. 274; Thompson v. S., 43 Tex. 268; Meyer v. S., 4 Tex. Ap. 121; C. v. Lavery, 101 Mass. 207, 208, 209.

83. C. v. Lavery, supra. But see S. v. Buck, supra. See post, § 716.

84. Hope v. C., 9 Met. 134.

85. Post, § 716.

86. Hildreth v. P., 32 Ill. 36. On this ground we may presume C. v. Duffy, 11 Cush. 145, to have proceeded, though the judge delivering the opinion did not put it in exactly this form. And see Clifton v. S., supra; May v. S., 162 Ala. 87, 50 So. 360.

§ 715. **Reasonably Certain**—must be the allegation of value. It was ill to say "a receipt for one bale of cotton . . . of the value of," etc.; because it does not appear whether the value meant is of the receipt or of the cotton.[87] Of the value of "two hundred and five dollars" suffices without the added words, "lawful money of the United States," which are neither necessary nor usual.[88]

§ 716. 1. **Variance from Statute.**—The value alleged must be not less than the statute requires to authorize the punishment sought;[89] no harm comes from making it more. Or if, for example, the larceny of less than twenty-five dollars in value justifies a particular punishment, a charge of stealing "one box of percussion caps of the value of twenty-five cents" will cover the whole case,[90] the same as would putting the value higher.

2. **In the Proofs,**—if the value appears to be less than averred, it will sustain the indictment, unless it is so reduced as to call for a less punishment.[91] Or, if the value proved is greater than charged, the allegation will be equally sustained.[92] So, not as supporting the averment of value, but as a finding of a part,— equivalent to not guilty of the higher charge, but guilty of a lower, included in it,[93]—the jury may assess a value too low to authorize the punishment sought in the indictment, whereupon the lower punishment will follow. Thus,—

3. **On a Charge of Grand Larceny,**—the conviction may be for petit larceny.[94]

87. Williams v. S., 44 Ala. 396.

88. P. v. Winkler, 9 Cal. 234. And see P. v. Green, 15 Cal. 512; Gardner v. S., 25 Md. 146.

89. Vol. II, § 488b (2).

90. S. v. Chambers, 2 Greene (Iowa), 308.

91. Vol. II, § 488b (2), 541, 580; post, § 767; C. v. McKenney, 9 Gray, 114; May v. S., 162 Ala. 87, 50 So. 360. Some value must be proved. Lane v. S., 113 Ga. 1040, 39 S. E. 463; Partwood v. S., 124 Ga. 783, 53 S. E. 99; Francis v. S., 87 Miss. 493, 39 So. 87; Rooney v. S., 51 Neb. 576, 71 N. W. 309.

92. Vol. II, § 580; Fowler v. S., 170 Ala. 65, 54 So. 115; Todd v. Com., 29 Ky. L. 473, 93 S. W. 631; Com. v. Driegman, 26 Pa. S. Ct. 615.

93. Vol. II, §§ 1009-1011.

94. S. v. Bennet, 2 Tread. 693, 3 Brev. 515; post, § 769; P. v.

§ 717. **How conclude.**—That by statute the punishment varies with the value does not require the indictment to conclude against the form of the statute.[95]

IV. *The Allegation of Ownership.*

§ 718. 1. **What and why.**—As a part of the description and in identification[96] of the stolen things, the indictment must name the owner,[97] or excuse the omission; as, that he is unknown.[98]

2. **In Form,**—it is good and common, after describing the stolen things, to add, "of the goods and chattels of" one named;[99] or the expression may be any other of the like meaning.[1] We have seen that the particular words "goods and chattels" are unimportant.[2]

3. **Both the Christian and Surname,**—even in the case of a partnership, must be given if known,[3] but an addition is mere surplusage.[4]

Wetzel, 9 Cal. Ap. 223, 98 P. 549; Bryant v. S., 158 Ala. 26, 48 So. 543.

95. Vol. II, § 596, 597; Stat. Crimes, § 167.

96. Ante, §§ 699, 713; McBride v. C., 13 Bush, 337; S. v. Bell, 65 N. C. 313.

97. 2 East, P. C. 650, 778; S. v. Woodley, 25 Ga. 235; S. v. Dwyre, 2 Hill, S. C. 287; S. v. Merrill, 44 N. H. 624; Reg. v. Ward, 7 Cox, C. C. 421; P. v. Hanselman, 76 Cal. 460, 9 Am. St. 238; S. v. Ellis, 119 Mo. 437, 24 S. W. 1017; Stone v. S., 12 Tex. Ap. 193; Williams v. S., 19 Tex. Ap. 409; S. v. Lackey, 230 Mo. 707, 132 S. W. 602; S. v. Moxley, 41 Mont. 402, 408, 110 P. 83.

98. Vol. II, § 493 et seq., 545 et seq.; Reed v. C., 7 Bush, 641; S. v. Bell, supra; Culberson v. S., 2 Tex. Ap. 324; Taylor v. S., 5 Tex. Ap. 1; Thompson v. S., 9 Tex. Ap. 301; S. v. Schatz, 71 Mo. 502; Clements v. S., 43 Tex. Cr. Ap. 400, 66 S. W. 301; Shockley v. S., 38 Tex. Cr. 458, 42 S. W. 972.

99. Ante, § 697 (1); S. v. Bartlett, 55 Me. 200; King v. S., 44 Ind. 285; Garber v. S., 94 Ind. 219; P. v. Pigott, 126 Cal. 509, 59 P. 31; Skelton v. S., 149 Ind. 641, 49 N. E. 901; Evans v. S., 150 Ind. 651, 50 N. E. 820.

1. Dodd v. S., 10 Tex. Ap. 370; Mathews v. S., 17 Tex. Ap. 472; P. v. Arras, 89 Cal. 223, 26 P. 766; S. v. Griffin, 79 Iowa, 568, 44 N. W. 813. See Maddox v. S., 14 Tex. Ap. 447; S. v. Montgomery, 17 S. D. 500, 97 N. W. 716; S. v. Faulk, 22 S. D. 183, 116 N. W. 72; Bennett v. S., 73 Ark. 386, 84 S. W. 483.

2. Ante, § 699.

3. Johnson v. S., 59 Ala. 37; Willis v. P., 1 Scam. 399; Scott v. S., 42 Ark. 73. See Calloway v. S., 7 Tex. Ap. 585; Hannahan v. S., 7 Tex. Ap. 664.

4. Ante, § 506 (2) and note;

4. **Where the Name of a Corporation**—is stated as owner, there need be no averment that it is a corporation.[5]

§ 719. **To Different Offenses**—somewhat differing rules as to the ownership apply. So that it is not quite safe to accept what is said under the other titles as our guides in this; but the reader may consult, as perhaps helpful, Arson,[6] Burglary,[7] Cheats and False Pretences,[8] Conspiracy,[9] Embezzlement,[10] Forcible Entry and Detainer,[11] Forgery,[12] Malicious Mischief,[13] Receiving Stolen Goods,[14] and Robbery.[15]

§ 720. 1. **Some Election**,—in the allegation of ownership, is often allowed the prosecutor; as,—

2. **Where there is both a General and Special Owner**,—the rule is nearly universal that the pleader may charge the goods as belonging to either, though often the convenience of making proof will suggest practical grounds for choice.[16] For example,—

post, § 784; 2 East, P. C. 778; C. v. Manley, 22 Pick. 173, 174; Anonymous, 8 Mod. 248; Rex v. Robinson, Holt, N. P. 595; S. v. Grant, 22 Me. 171; Rex v. Ogilvie, 2 Car. & P. 230. See S. v. Glisson, Phillips, N. C. 195; C. v. Parmenter, 101 Mass. 211, 213.

5. S. v. Fitzpatrick, 9 Houst. 385. See Vol. II, § 682; S. v. Bench, 68 Mo. 78; S. v. Fogerty. 105 Iowa, 32, 74 N. W. 754; S. v. Rollo, 3 Pen. (Del.) 421, 54 A. 683; Mattox v. S., 115 Ga. 212, 41 S. E. 709; Bingle v. S., 161 Ind. 369, 68 N. E. 645; Ter. v. Garcia, 12 N. M. 87, 75 P. 34. Contra. S. v. Clark, 223 Mo. 48, 122 S. W. 665.

7. Ante, §§ 137-139.

6. Ante, §§ 36-39.

8. Ante, §§ 173, 174; P. v. Frankenberg, 236 Ill. 408, 86 N. E. 128.

9. Ante, § 210.

10. Ante, § 320 (2).

11. Ante, §§ 373, 381-386.

12. Ante, §§ 420-425.

13. Post, § 843.

14. Post, § 983.

15. Post, § 1006.

16. Langford v. S., 8 Tex. 115; S. v. Furlong, 19 Me. 225; Grant v. S., 3 Tex. Ap. 1; Gaines v. S., 4 Tex. Ap. 330; Fore v. S., 5 Tex. Ap. 251; Dignowitty v. S., 17 Tex. 521, 67 Am. D. 670; Billard v. S., 30 Tex. 367; S. v. Stanley, 48 Iowa, 221; S. v. Tillett, 173 Ind. 133, 89 N. E. 589; S. v. Pigg, 80 Kan. 481, 103 P. 121.

3. **Goods stolen from a Common Carrier**—may be laid as his,[17] or as the general owner's. More fully,—

§ 721. 1. **Special Ownership.**—The rule is general, yet liable to be limited in the particular case, that where chattels are taken feloniously from any bailee or other special owner,[18]—as, a common carrier,[19] a pawnee,[20] an agistor,[21] a hirer of the chattel,[22] one having it to perform labor upon,[23] the landlord of an inn with whom it is left,[24] any other person who has it for safe keeping otherwise than as servant.[25] a mortgagee in possession,[26] one who under our statutes has taken up an animal as an estray,[27] one

17. Rex v. Trollop, J. Kel. 39; P. v. Smith, 1 Par. Cr. 329; Rountree v. S., 58 Ala. 381; S. v. Lackey, 230 Mo. 707, 132 S. W. 602; S. v. Phillips, 73 S. C. 236, 53 S. E. 370; Allen v. S., 134 Ala. 159, 32 So. 318.

18. New Crim. Law, II, §§ 788-793; 2 Hale, P. C. 181; Reg. v. Bird, 9 Car. & P. 44; Rex v. Eastall, 2 Russ. Crimes (3d Eng. Ed.) 153; S. v. Hardison, 75 N. C. 203; Blackburn v. S., 44 Tex. 457; Kennedy v. S., 31 Fla. 428, 12 So. 858; S. v. Powell, 103 N. C. 424, 14 Am. St. 821, 9 S. E. 627; Duren v. S., 15 Tex. Ap. 624; S. v. Allen, 103 N. C. 433; Phelps v. P., 72 N. Y. 334; S. v. Harmon, 104 N. C. 792, 10 S. E. 474; S. v. Rivers, 60 Iowa, 381, 13 N. W. 73, 14 N. W. 738; Skipworth v. S., 8 Tex. Ap. 135. See S. v. Edwards, 86 N. C. 666; Doss v. S., 28 Tex. Ap. 506; May v. S., 162 Ala. 87, 50 So. 360; Higdon v. S., 1 Ala. Ap. 174, 56 So. 13; S. v. Pullen, 3 Pen. (Del.), 184, 50 A. 538; S. v. Tillett, 173 Ind. 133, 89 N. E. 589; S. v. Whitman, 103 Minn. 92, 114 N. W. 363; S. v. Vincent, 16 S. D. 62, 91 N. W. 347. As a common carrier. Com. v. Broaddus, 144 Ky. 245, 137 S. W. 1049; see, also, Viberg v. S., 138 Ala. 100, 35 So. 53; Greene v. Com., 12 Ky. L. 750; S. v. O'Connell, 144 Mo. 387, 46 S. W. 175; S. v. Phillips, 73 S. C. 230, 53 S. E. 370.

19. Ante, § 720 (3); Rex v. Deakin, 2 East, P. C. 653; Allen v. S., 134 Ala. 159, 32 So. 318.

20. 2 Hale, P. C. 181; 1 Ib. 513; 2 East, P. C. 652; 1 Hawk, P. C., c. 33, § 47; C. v. O'Hara, 10 Gray, 469.

21. Rex v. Woodward, 2 East, P. C. 653.

22. S. v. Wisdom, 8 Port. 511; Jones v. S., 13 Ala. 153; S. v. Pettis, 63 Me. 124. See a subsequent paragraph in this section.

23. Rex v. Packer, 2 East, P. C. 653, 1 Leach, 357, note; S. v. Ayer, 3 Fost, N. H. 301.

24. Rex v. Todd, 2 East, P. C. 653; Rex v. Wymer, 4 Car. & P. 391; Miles v. S., 51 Tex. Cr. Ap. 587, 103 S. W. 854.

25. Rex v. Taylor, 1 Leach, 356; Rex v. Statham, cited 1 Leach, 357; see Reg. v. Ashley, 1 Car. & K. 198; Owen v. S., 6 Humph. 330; C. v. Morse, 14 Mass. 217, 219; Reg. v. Green, Dears. & B. 113.

26. Robinson v. S., 1 Kelly, 563.

27. Jinks v. S., 5 Tex. Ap. 68.

having in possession property purchased for public use,[28] a constable who has collected money for a creditor,[29] any other person having the lawful possession of the article in distinction from a bare custody thereof,[30] or even such unlawful possession as the thief's who has stolen it,[31]—the ownership may be laid either in such possessor or the real owner, at the election of the pleader. But—

2. **A Charge of stealing One's Own Goods**—from a bailee must lay the ownership in the latter,[32]—an obvious exception to the general rule. So,—

3. **While Chattels let for Hire**—are ordinarily within the general rule, if the letting is such as, like a lease of real estate, divests the general owner of the present right of occupancy as owner,[33] the ownership must be laid in the hirer,—as, in England, where furniture is stolen from a lodger's room, in the lodger.[34]

28. P. v. Bennett, 37 N. Y. 117, 93 Am. D. 551; Phelps v. P., 72 N. Y. 334.

29. Hill v. S., 1 Head, 454. In an English case, Alderson, B. intimated that money collected by a servant cannot, before it has reached the master, be laid in the latter. Reg. v. Rudick, 8 Car. & P. 237. But see Rex v. Remnant, Russ. & Ry. 136. And compare with Rex v. Adams, Russ. & Ry. 225; C. v. Lawless, 103 Mass. 425; Reg. v. Barnes, Law Rep. 1 C. C. 45, 10 Cox, C. C. 255.

30. S. v. Addington, 1 Bailey, 310, 311.

31. Ward v. P., 3 Hill, N. Y. 395, 6 Hill, N. Y. 144; Rex v. Wilkins, 1 Leach, 520, 623; S. v. Pigg, 80 Kan. 481, 103 P. 121; Taylor v. S., 62 Tex. Cr. 611, 138 S. W. 615.

32. New Crim. Law, II, § 790; Adams v. S., Broom, 448; Rex v. Wilkinson, Russ. & Ry. 470; Rex v. Bramley, Russ. & Ry. 478; Palmer v. P., 10 Wend. 165, 25 Am. D. 551. See Tumalty v. Parker, 100 Ill. Ap. 382 and Ayers v. S., 3 Ga. Ap. 305, 59 S. E. 924.

33. Gordon v. Harper, 7 T. R. 9; Ward v. Macauley, 4 T. R. 489.

34. Rex v. Belstead, Russ. & Ry. 411; Rex v. Brunswick, 1 Moody, 26. See Rex v. Healey, 1 Moody, 1.

Some Special Cases. Persons having exchanged watches for a few days, on a larceny of one of them the ownership was rightly laid in the one in possession. Yates v. S., 10 Yerg. 549. One who had received attached chattels from a deputy sheriff, promising to redeliver them on demand, was held to sustain only the relation of a servant, and to have in them no special property; so that on their being stolen the ownership could not be laid in him. C. v. Morse, 14 Mass. 217. The ownership of goods stolen from a ward may be laid in the guardian. Thomasson v. S., 22

4. **A Minor's Clothing**—may ordinarily, it is believed always, be laid as his, being regarded as a gift; "for the boy hath capacity to take it."[35] Or commonly it may be equally well charged as the father's; though the other is the usual and safer way.[36] And sometimes it would be ill to mention the father as owner; as, where the son is apprenticed to him, and he furnishes the clothing under the indenture.[37]

§ 722. 1. **Since a Trespass**—is an essential element in common law larceny, the owner must sustain to the stolen things a relation which would entitle him to the action of trespass for their taking.[38] Such is the rule in principle, and reasonably so in authority, but the judicial utterances to it are not very distinct. Thus,—

2. **A Mere Servant**—has only a custody of goods, and he can maintain no action for them; hence he has in them no ownership.[39]

§ 723. 1. **Where the Ownership is Joint,**—as in a business firm, or the like, it must be laid in all.[40] Each name

Ga. 499; Trafton v. S., 5 Tex. Ap. 480; Crockett v. S., 5 Tex. Ap. 526. Bank-notes stolen from the mail may be laid as the property of the person forwarding them. U. S. v. Burroughs, 3 McLean, 405. And see C. v. Lawless, 103 Mass. 425. As to various questions, see Reg. v. Vincent, 2 Den. C. C. 464, 5 Cox, C. C. 537, 9 Eng. L. & Eq. 548; Rex v. Boulton, 5 Car. & P. 537; Reg. v. Pratt, Dears, 360, 6 Cox, C. C. 373, 26 Eng. L. & Eq. 574; Reg. v. Rowe, Bell, C. C. 93, 8 Cox, C. C. 139; Reg. v. Whitehead, 9 Car. & P. 429; Reg. v. King, 4 Fost. & F. 493; Reg. v. Cain, 2 Moody, 204; Reg. v. Pritchard, Leigh & C. 34, 8 Cox, C. C. 461; Reg. v. Barnes, Law Rep. 1 C. C. 45, 10 Cox, C. C. 255.

35. Rex v. Haynes, 12 Co. 113; Anonymous, 1 Leach, 464, note; S. v. Koch, 4 Harring. Del. 570.

36. 2 East, P. C. 654; Reg. v. Hughes, Car. & M. 593; Jackson v. S., 47 Tex. Cr. 85; 79 S. W. 521; affirmed in 47 Tex. Cr. 85, 80 S. W. 631.

37. Rex v. Forsgate, 1 Leach, 463, 464.

38. New Crim. Law, II, §§ 799, 823; Rex v. Foster, Russ. & Ry. 412; C. v. Morse, 14 Mass. 217, 219; Rex v. Deakin, 2 Leach, 862, 875, 876.

39. 2 East, P. C. 652; Rex v. Hutchinson, Russ. & Ry. 412; S. v. Jenkins, 78 N. C. 478; S. v. Washington, 15 Rich. 39; Heygood v. S., 59 Ala. 49; C. v. Lawless, 103 Mass. 425; Hill v. S., 55 Tex. Cr. 407, 117 S. W. 823.

40. S. v. Frame, 4 Harring. Del. 569; S. v. McCoy, 14 N. H. 364; S. v. Owens, 10 Rich. 169; Hogg v. S., 3 Blackf. 326; C. v. Trimmer, 1 Mass. 476; S. v. Wilson, 6 Ore. 428;

should be given in full;[41] simply the partnership name, for example, not sufficing. Nor, where partners are the owners, need either the fact of the partnership, or the firm name, be averred.[42] And if one of them has such a separate possession as gives him a special property, it will not be ill to lay the ownership in him alone.[43] Where it is laid in three, it will be a fatal variance to prove it in two only.[44]

2. **Several.**—If the thing belongs to A, B, and C, not jointly, but each owning his several part,[45] it is ill to say "of the goods of A, B, and C," which means a joint ownership.[46]

§ 724. Statutory Modifications.—In England,[47] and in some of our States,[48] statutes permit the ownership to be laid in one named "and others," or otherwise simplify the common law rule.

§ 725. 1. In the Estate of a Deceased Person,—the ownership cannot be laid;[49] but it may be, in the adminis-

S. v. London, 3 S. C. 230; Brown v. S., 35 Tex. 691. Statutory rule in Smith v. S. (Miss.), 31 So. 806.

41. Ante, § 718 (3); S. v. Clark, 223 Mo. 48, 122 S. W. 665; Buffington v. S., 124 Ga. 24, 52 S. E. 19; Porter v. Com., 22 Ky. L. 1657, 61 S. W. 16.

42. C. v. O'Brien, 12 Allen, 183.

43. S. v. Wilson, supra; Samora v. S., 4 Tex. Ap. 508; Reg. v. Bird, 9 Car. & P. 44; Chapple v. S., 124 Tenn. 105, 135 S. W. 321.

44. Parmer v. S., 41 Ala. 416. See Henry v. S., 45 Tex. 84; Riley v. S., 1 Ga. Ap. 651, 57 S. E. 1031; S. v. Hamilton, 77 S. C. 383, 57 S. E. 1098.

45. New Crim. Law, II, § 888 (2, 3); Lowe v. S., 57 Ga. 171; Addison v. S., 3 Tex. Ap. 40; S. v. Simons, 70 N. C. 386.

46. S. v. Ryan, 4 McCord, 16, 17 Am. D. 702; S. v. McCoy, 89 N. C. 466. See S. v. Mjelde, 29 Mont. 490, 75 P. 87; S. v. Moxley, 41 Mont. 402, 409, 110 P. 83.

47. 56 Geo. 3, c. 73; 7 Geo. 4, c. 64, § 14; Reg. v. Pritchard, Leigh & C. 34, 8 Cox, C. C. 461; Reg. v. Butterworth, 12 Cox C. C. 132, 2 Eng. Rep. 195; Reg. v. Cain, Car. & M. 309; Archb. Crim. Pl. (19th Ed.) 356.

48. S. v. Capps, 71 N. C. 93; Lasuley v. S., 19 Ohio St. 43; S. v. Harper, 64 N. C. 129; C. v. Arrance, 5 Allen, 517; S. v. Connor, 5 Coldw. 311; Widner v. S., 25 Ind. 234; P. v. Ah Sing, 19 Cal. 598.

49. S. v. Woodley, 25 Ga. 235; Ter. v. Valles, 15 N. M. 228, 103 P. 984. Contra, S. v. Sherman, 71 Ark. 349, 74 S. W. 293. Contra, P. v. Prather, 120 Cal. 660, 53 P. 259.

trator by name,[50] or founded on possession.[51] Where, after the death of a partner, his widow and the surviving partner continued the business together, the ownership of some stolen goods was held to be well laid in the two.[52]

2. **The Ownership of a Coffin,**—containing a body interred, was deemed properly charged as his who furnished it and buried the deceased.[53]

§ 726. 1. Husband and Wife.—While at common law a wife can own property in action and in reversion, she can have neither real nor personal estate in possession.[54] Therefore in larceny no ownership can be averred in her; it must be in her husband instead.[55] This rule, is seems, extends even to her paraphernalia and her wearing apparel.[56] And because the trial for larceny is in a court of common law wherein the doctrines of the equity tribunals are not the rules for decision, her separate estate is to be laid, not in her, but rather in her trustee;[57] or it may be in her husband if he has possession, by reason of his special property therein.[58] But—

2. **Our Modern Statutes,**—giving the wife a separate proprietorship *at law,* have considerably changed these rules,[59] yet not quite uniformly in our States.[60] In Indiana,

50. Cole v. C., 5 Grat. 696. How where there has been no administration, see Rex v. Smith, 7 Car. & P. 147; Reg. v. Tippin, Car. & M. 545; Wonson v. Sayward, 13 Pick. 402, 404, 23 Am. D. 691.

51. Reg. v. King, 4 Fost. & F. 493; Dreyer v. S., 11 Tex. Ap. 503; Rex v. Scott, 2 East, P. C. 655, Russ. & Ry. 13.

52. Rex v. Gaby, Russ. & Ry. 178.

53. S. v. Doepke, 68 Mo. 208, 30 Am. R. 785. See New Crim. Law, II, § 780.

54. 1 Bishop Mar. Women, §§ 64, 883-886.

55. 1 Hale, P. C. 513; Rex v. Roberts, 7 Car. & P. 485; Hughes v. C., 17 Grat. 565, 566, 567, 94 Am. D. 498; C. v. Cullins, 1 Mass. 116.

56. 1 Bishop Mar. Women, § 220, note; S. v. Hays, 21 Ind. 288.

57. Ante, § 138 (3); Rex v. French, Russ. & Ry. 491; Rex v. Wilford, Russ. & Ry. 517. If goods are stolen from a feme sole, and then she is married, the ownership may be laid in her by her maiden name. Rex v. Turner, 1 Leach, 536.

58. Davis v. S., 17 Ala. 415. See P. v. Swalm, 80 Cal. 46, 13 Am. St. 96.

59. Kennedy v. S., 31 Fla. 428, 12 So. 585; LeCointe v. U. S., 7 Ap. D. C. 16.

60. Ante, § 138 (3); S. v. Dredden, 1 Marv. 522, 41 A. 925.

the ownership of a shawl, presented her by a third person after marriage, was not permitted to be laid in her husband; it must be in her.[61] And doubtless under all the statutes, making her, *at law*, the separate owner, it is not ill to allege the ownership as hers;[62] but in most of our States, if the parties live together, and he maintains a possession with her of her legal effects, he is deemed to have a special property in them, so that a pleader who prefers may charge them as his.[63] Even the husband's goods in her possession, it has been held, may be alleged as hers.[64] In States where the community prevails, the rules differ more or less from these.[65]

V. *The Allegations where Goods are Stolen in one Jurisdiction and carried into another.*

§ 727. 1. **Already,**—the questions of law governing this subject have been considered.[66] The part of the doctrine relating to this sub-title is that, whether the original larceny was committed abroad or in another county of our own State, the complete act and intent which constitute any larceny must have transpired also in the county of the indictment.[67] Hence,—

2. **The Just Form of the Allegation,**—correct in principle, convenient, and common, is to lay the offense simply in the county of the prosecution, with no reference to anything done elsewhere. If transactions elsewhere are important, it is sufficient for them to appear in the evidence.[68]

61. Stevens v. S., 44 Ind. 469.

62. Petre v. S., 6 Vroom, 64.

63. Petre v. S., supra; S. v. Wincroft, 76 N. C. 38; S. v. Matthews, 76 N. C. 41; Lavender v. S., 60 Ala. 60; Alexander v. S., 9 Tex. Ap. 48; Ellis v. S., 76 Ala. 90. See S v. En, 10 Nev. 277.

64. C. v. McLaughlin, 103 Mass. 435. See C. v. Williams, 7 Gray, 337.

65. S. v. Gaffery, 12 La. Ann. 265; Merriweather v. S., 33 Tex. 789; Wilson v. S., 3 Tex. Ap. 206; Ware v. S., 2 Tex. Ap. 547; Overton v. S., 43 Tex. 616.

66. Vol. I, §§ 59, 60; New Crim. Law, I, §§ 137-142, 1061 (4); Stat. Crimes, § 140.

67. Ib.; Roth v. S., 10 Tex. Ap. 27.

68. New Crim. Law, I, §§ 138, 139; Dir. & F., § 608; Haskins v. P., 16 N. Y. 344; C. v. Dewitt, 10 Mass.

Yet where the original stealing was in our own State, it is not ill, at least under some of our statutes, to set it out, and then aver a bringing of the goods into the county of the venue;[69] but without statutory aid, we have denials of this,[70] and it seems destitute of foundation in principle.

§ 728. **Statutes,**—mingled with considerations from the common law, have more or less and variously regulated this question.[71] Where, in Alabama, one "who feloniously steals the property of another in any other State or country, and brings the same or any portion thereof into this State," was by statute punishable to the same extent as if the original stealing had been in this State, it was held that the indictment must set out the foreign larceny, and conform otherwise to the statutory terms.[72] And where the evidence was simply that the thing was stolen in the other State, and afterward was found in the defendant's possession in Alabama, the conviction was reversed.[73] But the court proceeded on the assumption that the offense existed only under the statute; otherwise the common law indictment would doubtless have been good.

§ 729. 1. **The Thing stolen must be described**—as it was in the county of the indictment, without regard to its form elsewhere at the original taking; for example, if it was a live turkey when stolen, but was killed before removal,

154; S. v. Smith, 66 Mo. 61; Hurt v. S., 26 Ind. 106, 107; P. v. Mellon, 40 Cal. 648; Powell v. S., 52 Wis. 217, 9 N. W. 17; S. v. Hatch, 91 Mo. 568, 4 S. W. 502. See also Graves v. S., 12 Wis. 591; Moore v. S., 55 Miss. 432; S. v. White, 76 Kan. 654, 92 P. 829. But see Johnson v. S., 47 Miss. 671; P. v. Prather, 120 Cal. 660, 53 P. 259.

69. Connell v. S., 2 Tex. Ap. 422; Jones v. S., 53 Ind. 235; Hurt v. S., supra.

70. Hutchinson v. S., 62 Ind. 556, 557.

71. On this whole subject, consult, further, Dir. & F. § 609; Norris v. S., 33 Miss. 373; Williams v. S., 15 Ala. 259; Watson v. S., 36 Miss. 593; Murray v. S., 18 Ala. 727; Ham v. S., 17 Ala. 188; Morissey v. P., 11 Mich. 327; Fox v. Davis, 55 Ga. 298; Crow v. S., 18 Ala. 541; Lovelace v. S., 12 Lea, 721; Harrington v. S., 31 Tex. Cr. 577, 21 S. W. 356; Carmisales v. S., 11 Tex. Ap. 474.

72. Alsey v. S., 39 Ala. 664; s. p. S. v. Morales, 21 Tex. 298.

73. See La Vaul v. S., 40 Ala. 44.

it cannot be charged in the second county as "one turkey," which means the live fowl.[74] And—

2. **If a Compound Larceny**—was the original offense,—as, a stealing from a dwelling house,—the indictment in the second county can be only for the simple larceny.[75]

VI. *The Indictment upon Statutes.*

§ 730. 1. **In "Statutory Crimes,"**—"statutory enlargements of the common law larceny" are specially considered, both as to the law and the procedure.[76] And under various other heads, that volume should be consulted in connection with this sub-title. Therefore the elucidations here will be more brief than would be otherwise required.

2. **The Indictment**—consists of mingling the common law form with the statutory terms variously as indicated by the particular frame of the statute and facts of the case.[77] Thus,—

§ 731. 1. **For Stealing a Thing,**—not the subject of larceny at common law, but made such by statute, the indictment concludes "against the form of the statute."[78]

2. **The Name of the Thing stolen,**—such as "bank-bill" or "bank-noté," if the indictment designates it by its name,[79] should properly be the statutory one.[80] Yet an-

74. C. v. Beaman, 8 Gray, 497; Rex v. Edwards, Russ. & Ry. 497. And see Rex v. McAleece, 1 Crawf. & Dix, C. C. 154; Rex v. Halloway, 1 Car. & P. 128.

75. Smith v. S., 55 Ala. 59.

76. Stat. Crimes, §§ 409-429.

77. For forms see Dir. & F., §§ 582, 584, 587, 589, 594-606, 610; P. v. Phelps, 49 How. Pr. 437; Phelps v. P., 72 N. Y. 334; S. v. Stephens, 32 Tex. 155; Reg. v. Butterworth, 12 Cox, C. C. 132, 2 Eng. Rep. 195; Reg. v. Trevenner, 2 Moody & R. 476; Williams v. S., 15 Ala. 259; Rex v. Bew, Russ. & Ry. 480; Rex v. Goddard, 2 Leach, 545; Rex v. Healey, 1 Moody, 1; Rex v. Pope, 1 Leach, 336; Rex v. Hurrell, Ryan & Moody, N. P. 296; Reg. v. Tatlock, 2 Q. B. D. 157; Snell v. S., 50 Ga. 219; Rex v. Walsh, 2 Leach, 1054, Russ. & Ry. 215; S. v. Hinton, 56 Ore. 428, 109 P. 24.

78. Vol. II, § 610; S. v. Dill, 75 N. C. 257; Warner v. C., 1 Par. 154, 44 Am. D. 114; Rex v. Pearson, 5 Car. & P. 121; P. v. Cook, 2 Par. Cr. 12; S. v. Foy, 82 N. C. 679. See S. v. Ripley, 2 Brev. 300.

79. Ante, §§ 413-416, 439.

80. Rex v. Chard, Russ. & Ry. 488; C. v. McDowell, 1 Browne (Pa.), 359; Damewood v. S., 1 How.

other word of the same or a more definite meaning may suffice,[71] as, "bank-bill" for the statutory "bank-note."[82]

§ 732. 1. **Written Instruments,**—required to be set out with great strictness in forgery,[83] need not be so in statutory larceny. But the methods permissible for describing the chattel in common law larceny[84] should be applied to the description of a thing made the subject of larceny by statute;[85] because, by the canons of interpretation, what is by written law added to the unwritten is to be regarded the same as though existing by the unwritten.[86] Such, at least, is practically as well as theoretically the better doctrine, though the courts have not in all cases[87] had it in their minds.[88] Thus,—

(Miss.) 262; S. v. Hinton, 56 Ore. 428, 109 P. 24.

81. Vol. II, § 611 et seq.

82. Eastman v. C., 4 Gray, 416; Low v. P., 2 Par. Cr. 37. See ante, § 450.

"Promissory note"—"note," etc. A statute made the "robbery or larceny" of promissory notes, etc., punishable "in the same manner as robbery or larceny of any goods or chattels." And a charge thereon of stealing "two ten-dollar notes of the president, directors, and company of the Bank of the United States," was adjudged ill, because not stating that they were promissory notes, or so describing them that they would appear to be such. C. v. Boyer, 1 Binn. 201, 205. And see S. v. Bond, 8 Iowa, 540.

83. Ante, §§ 403-412.

84. Ante, §§ 699-712; Fulshear v. S., 59 Tex. Cr. 376, 128 S. W. 134.

85. Rex v. Johnson, 3 M. & S., 539, 547. And see S. v. Cassel, 2 Har. & G. 407; Eells v. P., 4 Scam. 498; Crawford v. S., 2 Ind. 132; P. v. Jackson, 8 Barb. 637; S. v. Smart, 4 Rich. 356, 55 Am. D. 683; C. v. Stebbins, 8 Gray, 492; S. v. Hinton, 56 Ore. 428, 109 P. 24; Fulshear v. S., 59 Tex. Cr. Ap. 376, 128 S. W. 134. Larceny of deed. S. v. Hughes, 80 Miss. 609, 31 So. 963.

86. Stat. Crimes, §§ 123, 139, 141.

87. For example, S. v. Tilney, 38 Kan. 714; Territory v. Shipley, 4 Mont. 468, 2 P. 313. See S. v. Henry, 24 Kan. 457; Phelps v. P., 72 N. Y. 334.

88. S. v. Hall, 85 Mo. 669; C. v. Collins, 138 Mass. 483; C. v. Jenks, 138 Mass. 484; S. v. Hoke, 84 Ind. 137; S. v. Freeman, 89 N. C. 469; McQueen v. S., 82 Ind. 72; Wright v. C., 82 Va. 183; S. v. Wade, 7 Bax. 22; S. v. Ziord, 30 La. Ann. 867; S. v. Monroe, 30 La. Ann. 1241; S. v. Anderson, 25 Minn. 66, 33 Am. R. 455; Riggs v. S., 104 Ind. 261, 3 N. E. 886; Levy v. S., 79 Ala. 259. "Sixty dollars in United States currency." Leonard v. S., 115 Ala. 80, 22 So. 564; Lang v. S., 42 Fla. 595, 28 So. 856. "One ten-dollar bill, etc., all being paper money of the currency of the United States." Thomas v. S., 117 Ala. 84, 23 So. 659. See,

2. **Bank-notes.**—If a statute makes indictable the larceny of "any bank-note," it is sufficient [89] to aver a specified number of bank-notes with the denomination and value of each, and no more.[90] Even this form has been sustained where the denomination was omitted; as, "ten five-dollar bank-bills of the value of five dollars each."[91] Such method accords with what is established in laying stolen chattels at common law.[92] It has been held ill to say "sundry bank-bills, amounting together" to, and of the value of, a sum named.[93]

3. **Ordinary Promissory Notes**—are set out exactly like bank-bills. So that on a statute making indictable the larceny of "any promissory note," it is adequate to say "one promissory note for the payment of, etc., of the value

also, Johnson v. S., 119 Ga. 257, 45 S. E. 960. "Fifty dollars in United States money, currency and bank-notes." Bailey v. Com., 12 Ky. L. 512, 58 S. W. 425, is a sufficient description.

89. See the cases in the last note as indicating that even less may suffice.

90. S. v. Williams, 19 Ala. 15, 54 Am. D. 184; C. v. Richards, 1 Mass. 337; Baldwin v. S., 1 Sneed, 411; Fredrick v. S., 3 W. Va. 695; S. v. Stevens, 62 Me. 284; Eastman v. C., 4 Gray, 416; Sallie v. S., 39 Ala. 691; Bell v. S., 41 Ga. 589; McLaughlin v. C., 4 Rawle, 464; Carden v. S., 89 Ala. 130. In describing our National currency, the like principle adopted, but in varying forms. One form, adjudged sufficient, is, "one United States note, commonly called greenback, of the value of two dollars." McEntee v. S., 24 Wis. 43. To the same effect in substance are S. v. Beebee, 17 Minn. 241, 249; Hummel v. S., 17 Ohio St. 628; S. v. Thomason, 71 N. C. 146; Dull v. C., 25 Grat. 965; Hickey v. S., 23 Ind. 21. "One five and one two-dollar greenback bill, United States currency, National bank bills, and money," was adjudged inadequate. Lewis v. S., 3 Heisk. 333.

91. Pyland v. S., 4 Sneed, 357; S. v. Rout, 3 Hawks, 618; S. v. Mahanna, 48 N. H. 377; Rex v. Johnson, supra. And see P. v. Kent, 1 Doug. (Mich.) 42; Baggett v. S., 69 Miss. 625, 13 So. 816.

92. Ante, § 700; Rex v. Johnson, 3 M. & S. 539, 547.

93. Hamblett v. S., 18 N. H. 384; Croker v. S., 47 Ala. 53. And see S. v. Oakley, 51 Ark. 112. A form like this would be adequate under the modifying statutes of some of our States. McDivit v. S., 20 Ohio St. 231; S. v. Shonhausen, 26 La. Ann. 421; S. v. Green, 27 La. Ann. 598; S. v. Carro, 26 La. Ann. 377; S. v. Hockenberry, 30 Iowa, 504.

of,"etc.;[94] or even, it has been held, "one promissory note of the value of," etc.[95] But the phrase "sundry promissory notes," adding the collective value, was adjudged too indefinite;[96] yet with their numbers given it would be good.[97]

§ 733. **Attached to Freehold.**—At common law, it was insufficient to charge the larceny from a mining claim of "fifty-two pounds of gold-bearing quartz rock, the personal property of," etc.; because, *prima facie*,[98] the thing taken was real estate; and the allegation should have been added that it was first severed from the realty.[99] Where this sort of larceny is defined by a statute, and the indictment is on it, not the common law, its terms must be incorporated into the averments.[1] And—

§ 734. **The Descriptive and Limiting Words of the Statute,**—if it has such, beyond the mere name of the thing, must be covered by the allegation.[2] Thus, if the statutory words are "steal, etc., any bank-bills, etc., of fifty dollars or upwards, *knowing them to be such*," etc., the knowledge must be averred.[3] Or if the stealing of bank-bills is made penal only when the bank are incorporated, the fact of incorporation most be alleged.[4] So, in England, under 24 & 25 Vict. c. 96, § 27, "any valuable security other than a document of title to lands" being designated as the subject

94. Rex v. Milnes, 2 East, P. C. 602.

95. C. v. Brettun, 100 Mass. 206, 97 Am. D. 95. And see Digowitty v. S., 17 Tex. 521, 67 Am. D. 670. But see C v. Henry, 2 Brews. 566; C. v. Byerly, 2 Brews. 568.

96. Stewart v. C., 4 S. & R. 194.

97. Rex v. Johnson, 3 M. & S. 539. And see S. v. Cotton, 4 Fost. (N. H.) 143; S. v. Hinckley, 4 Minn. 345.

98. Ante, § 706.

99. P. v. Williams, 35 Cal. 671.

1. S. v. Liles, 78 N. C. 496; S. v. Thompson, 93 N. C. 537; Smitherman v. S., 63 Ala. 24. And see Rex v. Finch, 1 Moody, 418; S. v. Stone, 1 Vroom, 299; Sullins v. S., 53 Ala. 474; Schamberger v. S., 68 Ala. 543; Pinckard v. S., 62 Ala. 167; S. v. Shuler, 19 S. C. 140; S. v. Sheppard, 33 La. Ann. 1216; S. v. Ballard, 97 N. C. 443, 1 S. E. 685. Compare with Rex v. Caradice, Russ. & Ry. 205.

2. S. v. Brown, 4 Port. 410; Angel v. C., 2 Va. Cas. 228.

3. Gatewood v. S., 4 Ohio, 386; Rich v. S., 8 Ohio, 111.

4. Spangler v. C., 3 Binn. 533.

of the larceny, the kind of security must be particularized;[5] or, at least, in some way be shown not to be of the excepted sort.

§ 735. **A Fuller Description**—than the foregoing rules requires, is optional with the pleader.[6] In some of our States, it will be prudent or perhaps indispensable, to make it. In none, need the tenor of a written instrument be given as in forgery; but some expansion of the allegation, beyond a mere designating of it after the manner of a chattel at the common law, yet not exactly how much and what, may probably be required by some of our tribunals.[7] In some States, the statutes,[8] either directly or indirectly govern the question. One case intimates that payment of the security should be negatived;[9] but as only *prima facie* guilt need be shown,[10] such plainly is not the general doctrine.[11]

§ 736. 1. **Value**[12] **and Ownership**[13]—must be laid in these statutory larcenies the same as in others. As to value, it does not suffice simply to state the denomination of a bank-bill; it must be added, of the value of so much.[14] Yet the denomination[15] is ordinarily a measure of the value, and averred with it.[16]

5. Reg. v. Greenland, Law Rep. 1 C. C. 65, 10 Cox, C. C. 377.

6. Phelps v. P., 72 N. Y. 334, 336.

7. S. v. Kroeger, 47 Mo. 530; S. v. McLeod, 5 Jones, (N. C.), 318; S. v. Brown, 8 Jones, 443; P. v. Holbrook, 13 Johns. 90; Rex v. Craven, Russ. & Ry. 14, 2 East, P. C. 601; C. v. Moseley, 2 Va. Cas. 154; Pomeroy v. C., 2 Va. Cas. 342; S. v. Emery, Brayt. 131; P. v. Jackson, 8 Barb. 637; Salisbury v. S., 6 Conn. 101.

8. S. v. Thomas, 2 McCord, 527; Gossett v. S. (Tex. Cr. Ap. 1909), 123 S. W. 428.

9. Stewart v. C., 4 S. & R. 194, 195.

10. Ante, §§ 706, 733.

11. Phelps v. P., 72 N. Y. 334, 6 Hun, 401.

12. Wilson v. S., 1 Port. 118. See S. v. King, 37 La. Ann. 91; S. v. Brown, 113 N. C. 645, 18 S. E. 51; S. v. Carter, 113 N. C. 639, 18 S. E. 517; P. v. Silbertrust, 236 Ill. 144, 86 N. E. 203.

13. S. v. Cadle, 19 Ark. 613; Martin v. S., 16 Tex. 240.

14. Wilson v. S., supra; S. v. Pierson, 59 Iowa, 271, 13 N. W. 291; Brewin v. S., 49 Tex. Cr. Ap. 296, 92 S. W. 420. See, Johnson v. S., 159 Ala. 113, 48 So. 792.

15. Ante, § 732 (2).

16. S. v. Cassel, 2 Har. & G. 407.

2. **"Goods and Chattels"**—are not the technical words for bank-bills and promissory notes;[17] so properly they should not be used. But by rejecting them as surplusage from an indictment, it may be sustained.[18]

§ 737. 1. **"Feloniously,"**—in the felony of statutory larceny, should be in the indictment even though not in the statute.[19] So it is in most of our States,[20] but there are exceptions.[21]

2. **Petit Larceny**—is in some States only misdemeanor. Then the superfluous "feloniously" will not harm the indictment.[22]

§ 738. **Variance**—should be avoided.[23] Thus, though the name of the bank issuing a bank-bill need not be alleged,[24] if it is, it must be proved as laid.[25] So the averment "of the lawful money of the United States" must, if inserted, be proved. Notes issued by a National Bank have been held not to be such.[26]

17. Stat. Crimes, § 344.

18. Ante, § 699 (2) and note; Eastman v. C., 4 Gray, 416; Turner v. S., 1 Ohio St. 422. But see P. v. Kent, 1 Doug. (Mich.) 42.

"Money." In England, by virtue of 14 and 15 Vict., c. 100, § 18, bank-bills may be laid as "money," though not in circulation but in the hands of the bankers. Reg. v. West, Dears. & B. 109, 7 Cox, C. C. 183, 40 Eng. L. & Eq. 564. Yet, without statutory help, they are not generally regarded as money, but coin is. Stat. Crimes, § 346; New Crim. Law, II, § 785; ante, §§ 703, 704.

19. Vol. II, § 535 et seq.

20. Barker v. C., 2 Va. Cas. 122.

21. Prim v. S., 32 Tex. 157; S. v. Sipult, 17 Iowa, 575. See also, S. v. Hogard, 12 Minn. 293.

22. S. v. Joiner, 19 Mo. 224. See Vol. II, § 537; S. v. Boyce, 65 Ark. 82, 44 S. W. 1043.

23. For example, see U. S. v. Hardyman, 13 Pet. 176, 179; U. S. v. Burroughs, 3 McLean, 405; Stewart v. S., 62 Md. 412.

24. Ante, § 732 (2).

25. Pomeroy v. C., 2 Va. Cas. 342. See also C. v. Williams, 1 Va. Cas. 14.

26. Hamilton v. S., 60 Ind. 193, 28 Am. R. 653. See P. v. Jones, 5 Lans. 340; S. v. Collins, 72 N. C. 144. As to numbered certificates of stock, see P. v. Coon, 45 Cal. 672.

CHAPTER CXXXV.

LARCENY, AS TO THE EVIDENCE.

Consult—the places referred to introducing the last chapter.

§ 738 a. **How Chapter divided.**—We shall consider, I. The Presumption from the Possession of the Stolen Goods; II. Other Questions of Evidence.

I. *The Presumption from the Possession of the Stolen Goods.*

§ 739. 1. **The Reported Cases**—on this topic are, in number, enormous. And they are exceptionally discordant. Not two, but many differing views and shades of opinion appear in them. So that however accurately the true doctrine may have been apprehended in some, it has not been many times well explained; because not many enunciations of a legal truth, in terms exact, clear, and full, from a source always consulted and always with respect, like a judicial opinion, are required to secure its universal acceptance, and put an end to the multiplication of cases on the subject.

2. **Limits of Question.**—The *corpus delicti,* or fact that the goods have been stolen, is a thing apart from the presumption we are considering, to be proved, in general, by independent evidence.[27] So that before the presumption can be invoked, the fact of the stealing must be otherwise shown; the sphere of this presumption being, not to prove the theft, but to identify the thief.[28] Now,—

27. Vol. II, §§ 1056-1060.

28. 2 Hale, P. C. 290; S. v. Taylor, 25 Iowa, 273; Brown v. S., 59 Ga. 456; Belote v. S., 36 Miss. 96, 72 Am. D. 163; S. v. Patterson, 78 N. C. 470; Reg. v. Hall, 1 Cox, C. C. 231; P. v. Caniff, 2 Par. Cr. 586; Hunt v. C., 13 Grat. 757, 70 Am. D.

§ 740. 1. **The Just Doctrine**—of this sub-title is believed to be that, when the fact of a theft has been shown, and the question is whether or not the defendant committed it, his possession of the stolen goods, either sole or joint with others, at a time not too long after the stealing, is a circumstance for the jury to consider and weigh in connection with the other evidence. Its significance will vary with its special facts, and with the other facts of the case; among which are the nearness or remoteness of the proven possession to the larceny, the nature of the thing as passing readily from hand to hand or not, what explanations he made on its being discovered that he had the goods, together with such other facts as ought reasonably to influence a juror's opinion. And—

2. **The Greater Number of the Cases,**—especially the more recent ones, considered in connection with the familiar proposition that the law is a system as well of reason as of authority, expressed in not quite uniform terms and varying more or less in their outward forms, sustain the doctrine thus stated.[29]

443; Rex v. Yend, 6 Car. & P. 176; P. v. Williams, 57 Cal. 108. See Long v. S., 1 Swan (Tenn.), 287; Garcia v. S., 26 Tex. 209, 82 Am. D. 605; Bailey v. S., 52 Ind. 462, 21 Am. R. 182; post, § 742; Wilson v. S., 8 Ga. Ap. 816, 70 S. E. 1125; Sanders v. S., 167 Ala. 85, 52 So. 417; S. v. Trosper, 41 Mont. 442, 109 P. 858; Wiley v. S., 92 Ark. 586, 124 S. W. 249; S. v. Sparks, 40 Mont. 82, 105 P. 87.

29. Watkins v. S., 2 Tex. Ap. 73; Brown v. S., 59 Ga. 456; Howard v. S., 50 Ind. 190; P. v. Gill, 45 Cal. 285; P. v. Ah Ki, 20 Cal. 177; P. v. Chambers, 78 Ga. 1, 382; P. v. Antonio, 27 Cal. 404; P. v. Kelly, 28 Cal. 423; P. v. Gassaway, 23 Cal. 51; Curtis v. S., 6 Coldw. 9, 10; Davis v. S., 50 Miss. 86; Tucker v. S., 57 Ga. 503; Crilley v. S., 20 Wis. 244; Comfort v. P., 54 Ill. 404; McCoy v. S., 44 Tex. 616; Thompson v. S., 43 Tex. 268; Wilcox v. S., 3 Heisk. 110, 118; Yates v. S., 37 Tex. 202; P. v. Getty, 49 Cal. 581; Price v. C., 21 Grat. 846; S. v. Cassady, 12 Kan. 550; S. v. Ingram, 16 Kan. 14; P. v. Melvanae, 39 Cal. 614; P. v. Rodundo, 44 Cal. 538; Gablick v. P., 40 Mich. 292; C. v. Randall, 119 Mass. 107; C. v. Bell, 102 Mass. 163; Smith v. S., 58 Ind. 340; S. v. Hodge, 50 N. H. 510; Foster v. S., 1 Tex. Ap. 363; Hannah v. S., 1 Tex. Ap. 578; Perkins v. S., 32 Tex. 109; Way v. S., 35 Ind. 409; Clackner v. S., 33 Ind. 412; S. v. Brady, 27 Iowa, 126; S. v. Arnold, 12 Iowa, 479; S. v. Brown, 25 Iowa, 561; P. v. Wilson,

3. **The Leading Later Cases,**—covering a dozen years or more, are, for the convenience of the practitioner, considering that the doctrine in some of our States is not now the same as in earlier years, here in a note inserted in the alphabetical order of the States, without reference to what aspect of the question they sustain.[30] It will be comforting

30 Mich. 486; Jones v. S., 49 Ind. 549; Fisher v. S., 46 Ala. 717; Billard v. S., 30 Tex. 367, 94 Am. D. 317; Graves v. S., 12 Wis. 591; Heed v. S., 25 Wis. 421; Boyd v. S., 24 Tex. Ap. 570, 5 Am. St. 908; Shepperd v. S., 94 Ala. 102, 10 So. 663; Orr v. S., 107 Ala. 35, 18 So. 142; Bryant v. S., 116 Ala. 445, 23 So. 40; Perry v. S., 155 Ala. 93, 46 So. 470; P. v. St. Clair (Cal. 1896), 44 Pac. 234; P. v. Wong Chong Suey, 110 Cal. 117, 42 Pac. 420; Perry v. P., 38 Colo. 23, 87 Pac. 796; McDonald v. S., 56 Fla. 74, 47 So. 485; S. v. Hoffman, 53 Kan. 700, 708, 709, 37 Pac. 138; Hix v. P., 157 Ill. 382, 41 N. E. 862; Blaker v. S., 130 Ind. 203, 29 N. E. 1077; S. v. Pennyman, 68 Iowa, 216, 217, 26 N. W. 82; S. v. Wilson, 95 Iowa, 341, 64 N. W. 266; S v. McClain, 130 Iowa, 73, 106 N. W. 376; S. v. Sprague, 149 Mo. 409, 50 S. W. 901; S. v. Drew, 179 Mo. 315, 78 S. W. 594, 101 Am. St. 474n; S. v. Toohey, 203 Mo. 674, 102 S. W. 530; Dobson v. S., 46 Neb. 250, 64 N. W. 956; S. v. Lax, 71 N. J. L. 386, 59 Atl. 18; Ter. v. Livingston, 13 N. Mex. 318, 84 Pac. 1021; Askew v. U. S., 2 Okla. Cr. Ap. 155, 101 P. 121; Pace v. S. (Tex. Cr. 1894), 31 S. W. 173; Phillips v. S. (Tex. Cr. 1896), 34 S. W. 119; Kennon v. S., 46 Tex. Cr. 359, 82 S. W. 518; Randolph v. S. (Tex. Cr. 1894), 31 S. W. 173; Phillips v. S. (Tex. Cr. 1896), 34 S. W. 119; Kennon v. S., 46 Tex. Cr. 359, 82 S. W. 518; Randolph v. S. (Tex. Cr. 1899, 49 S. W. 591; Pool v. S., 51 Tex. Cr. 596, 103 S. W. 892; Gravely v. Com., 86 Va. 396, 400, 10 S. E. 431; S. v. Burns, 19 Wash. 52, 52 Pac. 316; Ingalls v. S., 48 Wis. 647, 4 N. W. 785.

30. **Alabama.** Roberts v. S., 61 Ala. 401; Cooper v. S., 63 Ala. 80; Green v. S., 68 Ala. 539; Henderson v. S., 70 Ala. 23; White v. S., 72 Ala. 195; Allen v. S., 73 Ala. 23; Harris v. S., 73 Ala. 495; Ross v. S., 82 Ala. 65, 2 So. 139; Cooper v. S., 87 Ala. 135, 6 So. 303; Thompson v. Richardson, 96 Ala. 488, 11 So. 728; Smith v. S., 133 Ala. 145, 31 So. 806; Black v. S., 1 Ala. Ap. 168, 55 So. 948; Jackson v. S., 167 Ala. 77, 52 So. 730.

Arizona. Territory v. Casio, 1 Ariz. 485, 2 P. 755.

Arkansas. Boykin v. S., 34 Ark. 443; Shepherd v. S., 44 Ark. 39; Reed v. S., 54 Ark. 621, 16 S. W. 819; Blankenship v. S., 55 Ark. 244; Wiley v. S., 92 Ark. 586, 124 S. W. 249.

California. P. v. Swinford, 57 Cal. 86; P. v. Williams, 57 Cal. 108; P. v. Velarde, 59 Cal. 457, 463; P. v. Titherington, 59 Cal. 598; P. v. Hurley, 60 Cal. 74, 44 Am. R. 55; P. v. Fagan, 66 Cal. 534; P. v. Gutierrez, 74 Cal. 81, 15 P. 444; P. v. Cline,

to the well-wishes of our jurisprudence, who examine these cases, and who remember the condition of the law on this subject fifty years ago, to note that very little now remains

74 Cal. 575, 16 P. 391; P. v. Matezuski, 11 Cal. Ap. 465, 105 P. 425.

Connecticut. S. v. Raymond, 46 Conn. 345.

Florida. Young v. S., 24 Fla. 147, 3 So. 881; McDonald v. S., 56 Fla. 74, 47 So. 485; Clark v. S., 59 Fla. 9, 15, 52 So. 578; Collier v. S., 55 Fla. 11, 45 So. 758.

Georgia. Duckett v. S., 65 Ga. 369; Smiley v. S., 66 Ga. 754; Davis v. S., 76 Ga. 16; Johnson v. S., 77 Ga. 68; Stevens v. S., 77 Ga. 310, 2 S. E. 684; Lovett v. S., 80 Ga. 255, 4 S. E. 912; Turner v. S., 114 Ga. 45, 39 S. E. 863; Bryant v. S., 4 Ga. Ap. 851, 62 S. E. 540; Wilson v. S., 9 Ga. Ap. 297, 70 S. E. 1125.

Idaho. S. v. Sanford, 8 Idaho 187, 67 P. 492.

Illinois. Bennett v. P., 96 Ill. 602; Friederg v. P., 102 Ill. 160; Smith v. P., 103 Ill. 82; Miller v. P., 229 Ill. 376, 82 N. E. 391.

Indiana. Galvin v. S., 93 Ind. 550; Wagner v. S., 107 Ind. 71, 57 Am. R. 79; Mason v. S., 171 Ind. 78, 85 N. E. 776.

Iowa. S. v. Emerson, 48 Iowa, 172; S. v. Golden, 49 Iowa, 48; S. v. Hesians, 50 Iowa, 135; S. v. Richart, 57 Iowa, 245, 10 N. W. 657; S. v. Kelly, 57 Iowa, 644, 11 N. W. 635; S. v. Buckley, 60 Iowa, 471, 15 N. W. 289; S v.. Hallett, 63 Iowa, 259, 19 N. W. 206; S. v. Hopkins, 65 Iowa, 240, 21 N. W. 585; S. v. Peterson, 67 Iowa, 564, 25 N. W. 780; S. v. Pennyman, 68 Iowa, 216, 26 N. W. 82; S. v. Jordan, 69 Iowa, 506, 29 N. W. 430; S. v. Griffin, 71 Iowa, 372, 32 N. W. 447; S. v. Kirkpatrick, 72 Iowa, 500, 34 N. W. 301; S. v. Frahm, 73 Iowa, 355, 35 N. W. 451; S. v. Manley, 74 Iowa, 561, 38 N. W. 415; S. v. Tucker, 76 Iowa, 232, 40 N. W. 725; S. v. Kimes, 145 Iowa, 346, 124 N. W. 164.

Kansas. S. v. Stewart, 24 Kan. 250; S. v. Hoffman, 53 Kan. 700, 37 P. 138; S. v. Deuel, 63 Kan. 811, 66 P. 1037; S. v. Herron, 64 Kan. 363, 67 P. 861; S. v. McKinney, 76 Kan. 419, 91 P. 1068.

Louisiana. S. v. Kimble, 34 La. Ann. 392; S. v. Gonsoulin, 38 La. Ann. 459; S. v. Young, 41 La. Ann. 94, 6 So. 468.

Massachusetts. C. v. Deegan, 138 Mass. 182; C. v. Johnson, 150 Mass. 54, 22 N. E. 82.

Michigan. Gablick v. P., 40 Mich. 292; P. v. Walters, 76 Mich. 195, 42 N. W. 1105; P. v. Taylor, 93 Mich. 638, 53 N. W. 777.

Minnesota. S. v. Miller, 45 Minn. 521.

Mississippi. Payne v. S., 57 Miss. 348; Stokes v. S., 58 Miss. 677; Alexander v. S., 60 Miss. 953; Matthews v. S., 61 Miss. 155; Snowden v. S., 62 Miss. 100.

Missouri. S. v. Krieger, 4 Mo. Ap. 524; S. v. Kelly, 9 Mo. Ap. 512; S. v. Kelly, 73 Mo. 608; S. v. Brown, 75 Mo. 317; S. v. Butterfield, 75 Mo. 297; S. v. Crank, 75 Mo. 406; S. v. Jennings, 81 Mo. 185, 51 Am. R. 236; S. v. Jackson, 86 Mo. 18; S. v. Kennedy, 88 Mo. 341; S. v. Beatty, 90 Mo. 143, 2 S. W. 215; S v. Phelps, 91 Mo. 478, 4 S. W. 119; S. v. Castor, 93 Mo. 242, 5 S. W. 906; S. v. Warden, 94 Mo. 648, 8 S. W. 233;

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S. v. Warford, 106 Mo.
322, 16 S. W. 886; S. v
Mo. 538, 20 S. W. 239;
120 Mo. Ap. 490, 107 S

Montana. Ter. v. D
245, 14 P. 671; S. v.
Mont. 82, 105 P. 87; S
4 Mont. 442, 109 P. 858

Nebraska. Smith v.
358, 22 N. W. 780; R
Neb. 285, 53 N. W. 134

Nevada. S. v. Cliffor
33 Am. R. 526.

New York. P. v. Cr
288, 32 Am. R. 302; Go
82 N. Y. 231; P. v. We
Y. 569, 19 N. E. 279.

North Carolina. S.
N. C. 675; S. v. Rice,
S. v. Jennett, 88 N. C
Weaver, 104 N. C. 758,
S. v. Bridgers, 114 N.
E. 607.

Oregon. S. v. Hale,
S v. Brinkley, 55 Ore.
893.

South Carolina. S. v
S. C. 153, 65 S. E. 20

Tennessee. Lucre v
148; Cook v. S., 16 Lea,

Texas. Newton v. S.
138 S. W. 708; Hamp
Tex. Ap. 463; Conner
Ap. 455; Beckham v. S.
52; Hernandez v. S., 9 T
Jernigan v. S., 10 Te
Childress v. S., 10 Te
Shelton v. S., 11 Tex. A
v. S., 11 Tex. Ap. 253;
S., 11 Tex. Ap. 275; Dre
Tex. Ap. 503; Anderso
Tex. Ap. 576; Pettigre
Tex. Ap. 225; Truax v.

§ 741. **Prima Facie Case—Burden Shifting.**—Formerly it was often laid down that when the *corpus delicti* has been proved, if the stolen goods are shown to have been in the possession of the defendant after—or recently after—the theft, the burden of proof reverts to the defendant to explain the possession, failing which he must be convicted. Discordant and indistinct views were expressed as to whether the presumption was of law or of fact.[31] Later and more enlightened opinions discard this doctrine, in whatever form presented.[32]

§ 742. **The Possession must be Recent**—to have the effect we are considering.[33] And all deem that the presump-

Utah. P. v. Clauson, 2 Utah, 502.

Vermont. S. v. Daley, 53 Vt. 442, 38 Am. R. 694.

Washington. S. v. Humason, 5 Wash. 499; S. v. Walters, 7 Wash. 246; S. v. Bliss, 27 Wash. 463, 68 P. 87.

West Virginia. S. v. Heaton, 23 W. Va. 773; S. v. Reece, 27 W. Va. 375.

Wisconsin. S. v. Snell, 46 Wis. 524, 1 N. W. 225; Ingalls v. S., 48 Wis. 647, 4 N. W. 785; Baker v. S., 80 Wis. 416, 50 N. W. 518.

Wyoming. Robinson v. S., 18 Wyo. 216, 106 P. 24; Eads v. S., 17 Wyo. 490, 101 P. 946.

England. Reg. v. McMahon, 13 Cox, C. C. 275; Reg. v. Hughes, 14 Cox, C. C. 223; Reg. v. Carter, 12 Q. B. D. 522, 15 Cox C. C. 448.

31. 2 East, P. C. 656; 2 Russ. Crimes (5th Eng. Ed.) 275; S. v. Weston, 9 Conn. 527, 25 Am. D. 46; S. v. Brewster, 7 Vt. 118, 122; Knickerbocker v. P., 43 N. Y. 177 (but see Stover v. P., 56 N. Y. 315); Dillon v. P., 4 Thomp. & C. 203, 1 Hun, 670; S. v. Bruin, 34 Mo. 537; S. v. Gray, 37 Mo. 463; S. v. Williams, 54 Mo. 170; Foster v. S., 52 Miss. 695; Mondragon v. S., 33 Tex. 480, S. W.; Unger v. S., 42 Miss. 642; S. v. Lange, 59 Mo. 418; Gregory v. Richards, 8 Jones, N. C. 410; S. v. Turner, 65 N. C. 592; S. v. Hill, 65 Mo. 84; S. v. Graves, 72 N. C. 482; Belote v. S., 36 Miss. 96, 72 Am. D. 163; S. v. Kimes, 145 Iowa, 346, 132 N. W. 180.

32. Cases cited to the last section; Conkwright v. P., 35 Ill. 204 (limited in Comfort v. P., 54 Ill. 404); Watkins v. S., 2 Tex. Ap. 73; Martinez v. S., 41 Tex. 164; Thompson v. S., 43 Tex. 268; P. v. Brown, 48 Cal. 253; P. v. Noregea, 48 Cal. 123; P. v. Chambers, 18 Cal. 382; P. v. Ah Ki, 20 Cal. 177; Howard v. S., 50 Ind. 190, 193; Gablick v. P., 40 Mich. 292; Williams v. S., 4 Tex. Ap. 178; Stover v. P., 56 N. Y. 315, 318. And see the numerous more recent cases cited in the note before the last.

33. S. v. Floyd, 15 Mo. 349; S. v. Wolff, 15 Mo. 168; Hughes v. S., 8 Humph. 75; Hall v. S., 8 Ind. 439; S. v. Graves, 72 N. C. 482; Gregory v. Richards, 8 Jones, N. C. 410; Reg. v. Starr, 40 U. C. Q. B. 268; Beck v. S., 44 Tex. 430; Yates v. S., 37 Tex.

plain; but some references in text-books would seem to trace it to Lord Hale. "If," he says, in the passage referred to, " a horse be stolen from A, and the same day B be found upon him, it is a strong presumption that B stole him. Yet I do remember, before a very learned and wary judge, in such an instance, B was condemned and executed at Oxford assizes; and yet, within two assizes after, C, being apprehended for another robbery and convicted, upon his judgment and execution confessed he was the man that stole the horse, and being closely pursued desired B, a stranger, to walk his horse for him while he turned aside for a necessary occasion, and escaped; and B was apprehended with the horse and died innocently."[39] Surely nothing further need be said to satisfy the present generation that it is fully time for such barbarous folly to cease.

§ 744. **In a Larceny of Coin or Bank-notes,**—of the ordinary denominations, such as pass rapidly from hand to hand, the inculpating effect of recent possession is slight.[40] And, in wider terms, the strength of this evidence will vary with the nature of the thing stolen.[41] So—

§ 745. 1. **All the Attending Circumstances**—should be shown in connection with the fact of possession.[42] And—

2. **By the Jury**—all should be taken into the account.[43] And, however much or in whatever way the court may instruct and admonish them, the law permits them to give to the evidence of possession, the same as to the rest, simply such weight and effect as to themselves appears just;[44]

39. 2 Hale, P. C. 289.

40. Rex v. Atkinson, 1 Crawf. & Dix C. C. 161; P. v. Getty, 49 Cal. 581; Stover v. P., 56 N. Y. 315, 318; Reg. v. Smith, 3 Fost. & F. 123; Thompson v. S., 58 Fla. 106, 50 So. 507.

41. Rex v. Patridge, 7 Car. & P. 551; S. v. Bruin, 34 Mo. 537, 541.

42. Jones v. S., 26 Miss. 247; Engleman v. S., 2 Ind. 91, 52 Am. D. 494; C. v. Bell, 102 Mass. 163; S. v. Patterson, 78 N. C. 470; Black v. S., 1 Ala. Ap. 168, 55 So. 948.

43. Long v. S., 1 Swan, Tenn. 287; Curtis v. S., 6 Coldw. 9; Ivey v. S., 43 Tex. 425; Allen v. S., 42 Tex. 517.

44. Ante, § 740; Thomas v. S., 43 Tex. 658; Bailey v. S., 52 Ind. 462, 21 Am. R. 182; S. v. Walker, 41 Iowa, 217; C. v. Randall, 119 Mass.

though, more or less contrary hereto, the various cases in which seemingly the court p the presumption of guilt as controlling by their personal convictions.[45]

§ 746. Defendant explaining—(Res Gest covery of the stolen goods in the possession ant being a fact in the case, the doctrine of t teaches that what he said in connection with ticularly on its being made known to him, is either sde, especially if then he is directly tion charged with the theft.[47] If such expla to the jury reasonable, and it is not shown l tor to be false, its weight in the scale for hi considerable; but if it appears unreasonable

107; C. v. Bell, supra; Davis v. S., 50 Miss. 86; S. v. En, 10 Nev. 277; Barnes v. S., 43 Tex. 98; Thompson v. S., 43 Tex. 268; Price v. C., 21 Grat. 846; Wilcox v. S., 3 Heisk. 110, 118; Stover v. P., 56 N. Y. 315; Reg. v. Langmead, Leigh & C. 427, 9 Cox, C. C. 464; Graves v. S., 12 Wis. 591, 593; S. v. Williams, 2 Jones, N. C. 194; Sartorious v. S., 24 Miss. 602 (as to which, however, see Jones v. S., 30 Miss. 653, 64 Am. D. 175); Hall v. S., 8 Ind. 439; P. v. Carabin, 14 Cal. 438; P. v. Roderiquez, 16 Cal. Ap. 347, 116 P. 986; P. v. Gibson, 16 Cal. Ap. 358, 116 P. 987.

45. Ante, § 741; S. v. Hill, 65 Mo. 84 (but compare with S. v. Robbins, 65 Mo. 443); Simpson v. S., 4 Humph. 456; P. v. Caniff, 2 Par. Cr. 586; C. v. Millard, 1 Mass. 6; Hudson v. S., 9 Yerg. 408; Hudgins v. S., 26 Ga. 350; Jones v. S., 30 Miss. 653; S. v. Merrick, 19 Me. 398; S. v. Bennet, 3 Brev. 514; Pennsylvania v. Myers, Addison, 320; Jones v. P., 12 Ill. 259; S. v. Gray, 37 Mo. 463, 465. In a North Carolina case, Gaston, J. adn "From necessity, mit, in criminal cases, presumpti in criminal case to such evidence artificial operat natural tendency under the circu case." S. v. Smi And see S. v. Ki

46. Vol. II, § 1125 (2); ante, §

47. Harmon v. 54; Shackelford v Shackleford v. S. Foster v. S., 4 Te v. S., 41 Tex. 4 43 Tex. 147; S. 64 N. C. 594; Reg C. C. 270; Smith 16 So. 12, 14; H Ala. 33, 18 So. 2 116 Ala. 445, 23 S., 41 So. 298, 147 v. S., 28 Ga. 25 S., 171 Ind. 78, 8 Moore, 101 Mo. 3 182.

if it is shown to be false, it will bear against him heavily.[48] The court, in administering this branch of the law, should use all due caution to prevent the defendant manufacturing evidence for himself.[49] And his explanations, not made in connection with the discovery of the stolen property,—not, therefore, of the *res gestae*,—are inadmissible in his behalf.[50] Moreover, possibly there is a State or two wherein the whole doctrine of this section is denied.[51]

48. Ward v. S., 41 Tex. 611; Reg. v. Hughes, 1 Cox, C. C. 176; Reg. v. Evans, 2 Cox, C. C. 270; Walker v. S., 28 Ga. 254; Reg. v. Smith, 2 Car. & K. 207; S. v. Jones, 3 Dev. & Bat. 122; C. v. Millard, 1 Mass. 6; Davis v. P., 1 Par. Cr. 447; Reg. v. Dibley, 2 Car. & K. 818; Reg. v. Crowhurst, 1 Car. & K. 370; Reg. v. Exall, 4 Fost. & F. 922, 929, 930; Yarbrough v. S., 115 Ala. 92, 22 So. 534; P. v. Hurley, 60 Cal. 74, 77, 44 Am. 55; Franklin v. S., 3 Ga. Ap. 342, 59 S. E. 835; Waters v. P., 104 Ill. 544, 548; S. v. McKinney, 76 Kan. 419, 91 Pac. 1068; S. v. Kimble, 34 La. Ann. 392, 395; Com. v. McGorty, 114 Mass. 299; S. v. Hogard, 12 Minn. 293; S. v. Miller, 45 Minn. 521, 522, 48 N. W. 401; Jones v. S., 30 Miss. 653, 655, 64 Am. Dec. 175; S. v. Jennings, 81 Mo. 185, 209, 51 Am. 236; S. v. Castor, 93 Mo. 242, 250, 5 S. W. 906; S. v. Moore, 101 Mo. 316, 14 S. W. 182; S. v. Vinton, 220 Mo. 90, 119 S. W. 370; S. v. Garvin, 48 S. Car. 258, 26 S. E. 570; Garia v. S., 26 Tex. 209, 210; Mondragon v. S., 33 Tex. 480; Powell v. S., 11 Tex. Ap. 401, 402; Johnson v. S., 12 Tex. Ap. 385, 391; Hart v. S., 22 Tex. Ap. 563, 3 S. W. 741; Franklin v. S., 37 Tex. Cr. 312, 39 S. W. 680; Bacon v. S. (Tex. Cr. Ap. 1911), 134 S. W. 690; S. v. Eubank, 33 Wash. 293, 74 Pac. 378; Baker v. S., 80 Wis. 416, 421, 50 N. W. 518. If the explanation creates a reasonable doubt of guilt the jury should acquit. S. v. Peterson, 67 Iowa, 564, 567, 25 N. W. 780; Grentzinger v. S., 31 Neb. 460, 462, 48 N. W. 148; Clark v. S., 30 Tex. Ap. 402, 17 S. W. 942; Baker v. S., 80 Wis. 416, 421, 50 N. W. 518; Blaker v. S., 130 Ind. 203, 207, 29 N. E. 1077; S. v. Wilson, 95 Iowa, 341, 64 N. W. 266; S. v. Cross, 95 Iowa, 629, 64 N. W. 614; Gilmore v. S. (Tex. Cr. 1895), 33 S. W. 120; Crawford v. S., 113 Ala. 661, 21 So. 64; S. v. Dillon, 48 La. Ann. 1365, 20 So. 913; S. v. Lax, 71 N. J. L. 386, 59 Atl. 18; Johnson v. U. S., 2 Okla. Cr. 16, 99 Pac. 1022; McDonald v. S., 56 Fla. 74, 47 So. 485.

49. Vol. II, § 1087; Foster v. S., 4 Tex. Ap. 246.

50. Robinson v. S., 3 Tex. Ap. 487; Powell v. S., 44 Tex. 63; Cameron v. S., 44 Tex. 652; Henderson v. S., 70 Ala. 23, 25, 45 Am. 72; Carreker v. S., 92 Ga. 471, 17 S. E. 671; S. v. McClain, 130 Iowa, 73, 106 N. W. 376; Lohrey v. S., 91 Miss. 853, 45 So. 145; S. v. Moore, 101 Mo. 316, 331, 14 S. W. 182; Taylor v. S., 15 Tex. Ap. 356, 360.

51. Maynard v. S., 46 Ala. 85; S. v. Wisdom, 8 Port. 511; Taylor

§ 746 a. 1. **The Posesssion**—may be n(but in any other form; as, where the thing i ant's house. Yet such questions as by w whether known to him, and the like, will en1 sumptions in the several cases.[52] So—

2. **The Manner of Use.**—as whether ope is material to the effect of the possession.[53]

§ 747. 1. **In Offenses other than Larcen** object of this evidence to connect the defe proven crime,[54] it is equally admissible as in To illustrate,—

2. **Instances.**—It is pertinent in burglaı from the dwelling-house,[56] in shop-breaking be in receiving stolen goods.[58] Even in ı panied by robbery, possession of the fruits o: be a fact weighty in evidence.[59]

v. S., 42 Ala. 529. Compare, S. v. Nelson (Utah, 1911), 117 P. 71.

52. Lewis v. S., 4 Kan. 296; S. v. Johnson, Winst. 1. 238, 86 Am. D. 434; Turbeville v. S., 42 Ind. 490; S. v. Lindsey, 78 N. C. 499; S. v. Wilkerson, 72 N. C. 376; Reg. v. Banks, 1 Cox, C. C. 238; S. v. Bowers, 17 Iowa, 46; S. v. Wohlman, 34 Mo. 482, 86 Am. D. 117. The possession must be personal and exclusive and with an assertion, express or implied of ownership by defendant. S. v. Castor, 93 Mo. 242, 250, 5 S. W. 906; Clark v. S., 30 Tex. Ap. 402, 17 S. W. 942; P. v. Hurley, 60 Cal. 74, 75, 44 Am. 55; Blaker v. S., 130 Ind. 203, 205, 29 N. E. 1007; P. v. Wilson, 7 App. Div. (N. Y.) 326, 40 N. Y. S. 107; S. v. Lackland, 136 Mo. 26, 37 S. W. 812; S. v. Deyoe, 97 Iowa, 744, 66 N. W. 733; Funderburg v. S. (Tex. Cr. 1896), 34 S. W. 613; P. v. Wilson, 151 N. Y. 403, 45 N. E. 862; Van Str 184, 56 Pac. 90 Ga. Ap. 851, 62

53. Wafford ı Minor v. S., 56 S., 30 Miss. 653,

54. Ante, § 7

55. Ante, § 12 Ohio St. 146, Knickerbocker v The principle s been quite clear learned judge in Cr. 447, 451.

56. Reg. v. S & Dix, C. C. 87.

57. C. v. Mill

58. Reg. v. L C. 427, 9 Cox, Deer, Leigh & C 225.

59. Williams 106.

II. *Other Questions of Evidence.*

§ 748. First. *Some General Propositions:—*

The Wealth or Poverty—of the defendant, unconnected with other evidence, appears not to be admissible. But accompanied by some special fact, such as the sudden possession of money,[60] his poverty may be pertinent against him;[61] and so doubtless, in various circumstances, will be his wealth in his favor. Yet that he was reputed to be a person of property was in one case adjudged incompetent.[62]

§ 749. **In the Larceny of One's Own Goods**—from an officer holding them on legal process,[63] his knowledge of the seizure must appear,[64] else the presumption will be that he took them under a claim of right.

§ 750. 1. **Other Disconnected Larcenies**—by the defendant, cannot be shown as ground for presuming his commission of the one on trial.[65] But—

2. **The Possession of Other Stolen Goods**—is competent when it connects him with the transaction of which he is accused, not as tending to prove the other offenses, but this one.[66] And—

60. Perrin v. S., 81 Wis. 135, 50 N. W. 516.

61. C. v. Montgomery, 11 Met. 534, 45 Am. D. 227; S. v. Grebe, 17 Kan. 458. And see S. v. Cameron, 40 Vt. 555; C. v. Grose, 99 Mass. 423; Thompson v. S., 58 Fla. 106, 50 So. 507. Or that he had been paid or had borrowed money favorable. Fowler v. S., 170 Ala. 65, 54 So. 15 and see Dimmick v. U. S., 70 C. C. A. 141, 135 F. 257.

62. C. v. Stebbins, 8 Gray, 492, 496; Dorsey v. S., 110 Ala. 38, 20 So. 450; Snapp v. Com., 82 Ky. 173, 183, 184. Identity of stolen money see, Russell v. S. (Ala.), 38 So. 291; McDonald v. S., 56 Fla. 74, 47 So. 485. As to proof that money not identified was found on accused see P. v. Wilkenson, 60 Hun (N. Y.), 582, 14 N. Y. S. 827; Keating v. P., 169 Ill. 480, 43 N. E. 724; Anglin v. S., 52 Tex. Cr. 475, 107 S. W. 835; S. v. Johnson, 36 Wash. 294, 78 Pac. 903.

63. New Crim. Law, II, § 791.

64. S. v. Dewitt, 32 Mo. 571.

65. Vol. II, §§ 1120, 1124; Walker v. C., 1 Leigh, 574; S. v. Daubert, 42 Mo. 242; S. v. Bates, 46 La. Ann. 849, 15 So. 204; Hawkins v. S., 6 Ga. Ap. 109, 64 S. E. 289.

66. Yarborough v. S., 41 Ala. 405; Wiley v. S., 3 Coldw. 362; S. v. Ditton, 48 Iowa, 677; Gilbraith, v. S., 41 Tex. 567; S. v. Flynn, 124 Mo. 480, 27 S. W. 1105; P. v. Ross, 65 Cal. 104, 3 P. 491; S. v. Moore, 101 Mo. 316, 14 S. W. 182; S. v.

3. **A Contemporaneous Theft,**—when it a: the one on trial, may be admissible.[67] .

§ **751.** Secondly. *Value*:—

1. **Whenever Material**—is the question of value is required in allegation,[68] it must be ı

2. **The Exact Value,**—we have seen, is noı der our statutes essential; but the inquiry i things were worth more or less than a sum

Weaver, 104 N. C. 758, 10 S. E. 486; P. v. Cunningham, 66 Cal. 668, 4 P. 1144, 6 P. 700, 846; Reg. v. Jones, 14 Cox, C. C. 3; Webb v. S., 8 Tex. Ap. 115; Tyler v. S., 13 Tex. Ap. 205; Reed v. S., 54 Ark. 621, 16 S. W. 819; Housh v. P., 24 Colo. 262, 50 Pac. 1036; Com. v. Riggs, 14 Gray (Mass.), 376, 77 Am. D. 333; P. v. Nagle, 137 Mich. 88, 100 N. W. 273; S. v. Moore, 101 Mo. 316, 327, 14 S. W. 182; S. v. Bates, 182 Mo. 70, 81 S. W. 408; Cohoe v. S., 82 Neb. 744, 118 N. W. 1088; Ter. v. Livingston, 13 N. Mex. 318, 84 Pac. 1021; P. v. Hughes, 91 Hun (N. Y.), 354, 36 N. Y. S. 493; S. v. White, 89 N. Car. 462, 466; Penrice v. S. (Tex.), 105 S. W. 797; Bonners v. S. (Tex. Cr. 1896), 35 S. W. 650; Hurley v. S., 36 Tex. Cr. 73, 35 S. W. 371; Watters v. S. (Tex. Cr. 1906), 94 S. W. 1038; Lynns v. S., 53 Tex. Cr. 375, 111 S. W. 729; Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187.

67. Van Musgrave v. S., 28 Tex. Ap. 57; Moore v. S., 28 Tex. Ap. 377; Links v. S., 13 Lea, 701; S. v. Kelley, 65 Vt. 531, 27 A. 203; Holmes v. S., 20 Tex. Ap. 509. Yet see S. v. McGraw, 74 Mo. 573; Queen v. S., 108 Ala. 54, 18 So. 843; Echols v. S., 41 So. 298, 147 Ala. 700; P. v. Tucker, 104 Cal. 440, 448, 38 Pac. 195; P. v. 163, 93 Pac. 103 111 App. Div. (N Y. S. 917; S. v. V 335, 340; Alexanc App. 406. 17 S. 617; Buck v. S., 83 S. W. 387; Br Cr. 200, 91 S. W.

68. Ante, §§ 71

69. Ante, § 71 68 Mo. 98; Colli 233; Radford v. Hall v. S., 15 Te v. S., 17 Tex. A v. S., 10 Tex. Ap. S., 137 Ind. 474, 4 N. E. 271; Whitel 841; Parker v. S So. 641; Powell v. 13 S. E. 829; Be Ga. 830, 31 S. E. Kenney, 9 Gray (1 son v. S. (Tex. C S. W. 877. Value be proved by parc ing them. P. v. H (N. Y.) 90, 93; East, C. L. 602; S Me. 218, 238; Con Binn. (Pa.) 273, 27 441; Williams v. 523, 31 S. W. 40 v. S., 24 Ind. 50

guishes a higher from a lower punishment.[70] Where value is not an element in the punishment, it need not be averred; or if it is, it need not be proved.[71] Hence,—

3. **Further of Value.**—To convict of petit larceny requires no proof of value.[72] But in all cases, the jury must be satisfied the goods were of some value;[73] this being an element in larceny.[74] That they were so requires no proof; the jury may infer it from having inspected the articles, or having heard them described by the witnesses.[75]

4. **The Word "Value"**—is, like most others even in our legal language, slightly variable in meaning.[76] But—

5. **The Standard of Value,**—for our present inquiry, is ordinarily the market value of the goods, or that for which the like goods are, at the time and place of the theft, commonly in the markets bought and sold.[77] But there are val-

70. Ante, § 716; Miles v. S., 3 Tex. Ap. 58; Williams v. P., 24 N. Y. 405; Pittman v. S., 14 Tex. Ap. 576; Moore v. S., 17 Tex. Ap. 176; P. v. Harris, 77 Mich. 568; S. v. Davenport, 38 S. C. 348; Vandegrift v. S., 151 Ala. 105, 43 So. 852; Com. v. Riggs, 14 Gray (Mass.) 376, 77 Am. Dec. 333; Herd v. U. S., 13 Okla. 512, 75 Pac. 291.

71. C. v. Burke, 12 Allen, 182.

72. S. v. Slack, 1 Bailey, 330. See S. v. Walker, 119 Mo. 467, 24 S. W. 1011.

73. C. v. Burke, supra; S. v. Slack, supra; S. v. Gerrish, 78 Me. 20.

74. New Crim. Law, II, §§ 767 (3), 768 (1); Rex v. Phipoe, 2 Leach, 675; Ayers v. S., 3 Ga. Ap. 305, 59 S. E. 924.

75. C. v. Burke, supra; C. v. McKenney, 9 Gray, 114; C. v. Lawless, 103 Mass. 425; S. v. Gerrish, supra; Lane v. S. (Tex. Cr. 1894), 28 S. W. 202, 203; Collins v. S., 56 Tex. Cr. 385, 118 S. W. 1038.

76. See, for a meaning different from that expounded in the text. Chidester v. S., 25 Ohio St. 433.

77. S. v. Smith, 48 Iowa, 595; Coolidge v. Choate, 11 Met. 79; Gardner v. Field, 1 Gray, 151, 54; Butler v. Baird, 5 Rich. 154; White v. Concord Rld., 10 Fost. N. H. 188; Thornton v. Campton, 18 N. H. 20; McCracken v. West, 17 Ohio, 16; Cannon v. S., 18 Tex. Ap. 172; S. v. James, 58 N. H. 67; Pratt v. S., 35 Ohio St. 514, 35 Am. R. 617; Martinez v. S., 16 Tex. Ap. 122; P. v. Cole, 54 Mich. 238, 19 N. W. 968; S. v. Rook, 42 Kan. 419, 22 P. 626. And see Yarborough v. S., 41 Ala. 405; Glover v. S., 40 So. 354, 146 Ala. 690; S. v. Lewis, 144 Iowa, 483, 123 N. W. 168; S. v. Brown, 55 Kan. 611, 40 Pac. 1001; Cannon v. S. ,18 Tex. Ap. 172, 173; Keipp v. S., 51 Tex. Cr. 417, 103 S. W. 392; P. v. Gilbert, 163 Mich. 511, 128 N. W. 756.

uable things the subjects of larceny not marketab example, a second-hand coffin,[79] and the same con a degree but not fully applies to second-hand cl So a man's portrait of his deceased father, enhε the fact that he has no other, may give it a valu quite beyond any market test.[81] And where a t a value to the owner, though to no one else, to s larceny; its "value as to the rest of the world" l the words of Grose, J., "immaterial."[82] Yet tl cases maintaining that, in fixing the grade of the the value merely to the owner is not the standarc jury.[83] Under facts like these, it is easier to say not right than what is. Probably in many if not ı cumstances, the cost of replacing the article wou value in larceny. In the uncertain condition of the ities, we may perhaps derive from the analogies of —such, for example, as the jury's power to est damage to one's feelings or reputation,—the rule th a thing is valuable without a market value, or a like standard of value, all the circumstances of i the victim of the theft, whether pecuniary or othe be laid before the jury, who thereupon will deter question of value.

6. **The Value of Coin and Treasury Notes,**— law, is a question of law, and no proof thereof is from witnesses;[84] though, in practice, it is so

78. S. v. Walker, 119 Mo. 467.

79. Pratt v. S., supra; S. v. Doepke, 68 Mo. 208, 30 Am. R. 785.

80. Ib.; Printz v. P., 42 Mich. 144, 36 Am. R. 437, 3 N. W. 306; S. v. McDermet, 138 Iowa, 86, 115 N. W. 884.

81. Green v. Boston, etc. Rld., 128 Mass. 221.

82. Rex v. Clarke, 2 Leach, 1036, 1039; s. c. nom. Rex v. Clark, Russ. & Ry. 181; Rex v. Ranson, 2 Leach, 1090, 1093.

83. S. v. Smith, supra; Cohen v. S., 50 Ala. 108; S. v. Doep P. v. Gilbert, 163 Mich. 8 W. 756, 17 Det. Leg. N. 9

84. Grant v. S., 55 Ala lins v. P., 39 Ill. 233; Dı 63 Ala. 12; Burrows v. S 474, 45 Am. St. 210, 37] McDonald v. S., 2 Ga. A S. E. 1067; McDowell v. S 373, 20 So. 864; S. v. Fa Dak. 183, 186, 116 N. W. 7 v. S., 3 Heisk (Tenn.) 120 ley v. S., 3 Tex. Ap. 163, 1 v. S., 35 Tex. Cr. 205, 32

given.[85]

7. **Ordinary Bank-notes**—are not quite within this rule. Of course, the jury must be satisfied of their genuineness; for this is an element essential to their value.[86] Proof of the corporate existence of the bank is sometimes said to be necessary, except where it is established by statutes of which the court takes judicial notice; but this is believed not to be so either on principle or on the better authorities.[87] It is commonly enough to show that the bank-bill is genuine, and it circulates as money; [88] or, that the defendant passed it, or admitted he passed it, as genuine.[89] The jury will then be justified in presuming that it was of the value expressed on its face.[90] Also the genuineness of bank-notes may be inferred from their circulating as money.[91] The evidence, therefore, need not be such as would be required in a suit to recover the sum due on them.[92]

8. **In Proof of the Value of Chattels,**—any evidence from which the jury can infer it is competent; [93] as, what the

Sowles v. S., 52 Tex. Cr. 17, 105 S. W. 178; Ector v. S., 120 Ga. 543, 48 S. E. 315; Joiner v. S., 124 Ga. 102, 52 S. E. 151.

85. S. v. Ford, 21 Wis. 610; Vincent v. S., 3 Heisk, 120. And see Blount v. S., 76 Ga. 17; Davis v. S., 32 Tex. Cr. 377, 23 S. W. 794; S. v. Carter, 113 N. C. 639. Value of securities not proved will be presumed to be nominal. P. v. Griffin, 38 How. Pr. (N. Y.) 475, 480; Whalen v. Com., 90 Va. 544, 549, 19 S. E. 182; Rooney v. S., 51 Neb. 576, 71 N. W. 309.

86. Low v. P., 2 Par. Cr. 37; S. v. Dobson, 3 Harring. Del. 563.

87. Ante, §§ 454-458; Corbett v. S., 31 Ala. 329, 340; Lithgow v. C., 2 Va. Cas. 297.

88. Crawford v. S., 2 Ind. 132; Shaw v. S., 3 Sneed, 86; C. v. Stebbins, 8 Gray, 492; Hildreth v. P., 32 Ill. 36; Corbett v. S., supra. And see Johnson v. P., 4 Denio, 364.

89. Cummings v. C., 2 Va. Cas. 128; Pomeroy v. C., 2 Va. Cas. 342; Baldwin v. S., 1 Sneed, 411.

90. Baldwin v. S., supra; Bagley v. S., 3 Tex. Ap. 163, 167; Jackson v. S., 31 Tex. Cr. 342, 20 S. W. 921. See S. v. Ready, 44 Kan. 697, 26 P. 58; Hamilton v. S., 60 Ind. 193, 28 Am. R. 653; Watson v. S., 64 Ga. 61.

91. Hildreth v. P., supra; Hummel v. S., 17 Ohio St. 628; Higgins v. P., 7 Lans. 110; Corbett v. S., supra.

92. S. v. Smart, 4 Rich. 356, 55 Am. D. 683.

93. Houston v. S., 13 Ark. 66; Saddler v. S., 20 Tex. Ap. 195; Printz v. P., 42 Mich. 144, 36 Am.

a reasonable doubt; a mere preponderance of the evidence not being adequate.[3]

§ 752. *Ownership and Owner's Non-consent*:—

1. **Proved.**—The ownership averred[4] must be proved,[5] and without variance in the name.[6]

2. **If a Corporation**—is laid as owner, only its *de facto* existence need be shown in evidence.[7] Or the more elaborate proofs *de jure* may be resorted to should the prosecuting power choose.[8]

3. **Witnesses and Proofs.**—The alleged owner is a competent witness,[9] but not to the exclusion of others,[10] It is not sufficient that he thinks he has lost the things.[11] his testi-

3. S. v. Wood, 46 Iowa, 116; S. v. Blain, 118 Ia. 466, 92 N. W. 650.

4. Ante, 8 718 et seq.

5. S. v. Furlong, 19 Me. 225; Jones v. C., 17 Grat. 563; Geiger v. S., 6 Neb. 545; Bagley v. S., 3 Tex. Ap. 163; Williams v. S., 4 Tex. Ap. 5; Ritcher v. S., 38 Tex. 643; King v. S., 44 Ind. 285; Bell v. S., 46 Ind. 453; S. v. Robinson, 35 La. Ann. 964; Rynes v. S. (Ark. 1911), 137 S. W. 800; S. v. James, 133 Mo. Ap. 300, 113 S. W. 232; S. v. Roswell, 153 Mo. Ap. 338, 133 S. W. 99; S. v. DeLuca (Del. 1911), 77 A. 742; Coleburn v. S. (Tex. Cr. Ap. 1911), 133 S. W. 882. Ownership unknown. Russell v. S., 97 Ark. 92, 133 S. W. 188.

6. Ante, §§ 718, 723; Brown v. S., 32 Tex. 124; S. v. Bell, 65 N. C. 313; Gabriel v. S., 40 Ala. 357; C. v. Williams, 161 Mass. 442, 37 N. E. 371; Johnson v. S., 4 Tex. Ap. 594; Blankenship v. S., 55 Ark. 244, 18 S. W. 54; Williams v. S., 26 Tex. Ap. 131. See P. v. McCarty, 5 Utah, 280, 17 P. 734; Fletcher v. S., 97 Ark. 1, 132 S. W. 918; S. v. Lackey, 230 Mo. 707, 132 S. W. 602; Johnson v. S., 58 Tex. Cr. 442, 126 S. W. 597. Brands on cattle are evidence of ownership. S. v. Wolfley, 75 Kan. 406, 89 Pac. 1046, 93 Pac. 337; Ter. v. Meredith, 14 N. Mex. 288, 91 Pac. 731, and may be proved orally. Lockwood v. S. (Tex. Cr.), 26 S. W. 200; Elsner v. S., 22 Tex. Ap. 687, 688, 3 S. W. 474; Tittle v. S., 30 Tex. Ap. 597, 599, 17 S. W. 1118; Sapp v. S. (Tex. Cr. Ap. 1903), 77 S. W. 456; P. v. Romero, 12 Cal. Ap. 466, 107 P. 109, or, if recorded by a certificate. Thompson v. S., 26 Tex. Ap. 466, 476, 9 S. W. 760; Brooke v. P., 23 Colo. 375, 48 Pac. 502; Areola v. S., 40 Tex. Cr. 51, 48 S. W. 195; S. v. Cotterel, 12 Ida. 572, 86 P., 527; S. v. Rice, 62 Kan. 868, 63 P. 737; Lowry v. S., 118 Tenn. 220, 81 S. W. 373.

7. Smith v. S., 28 Ind. 321; P. v. Barric, 49 Cal. 342.

8. C. v. Whitman, 121 Mass. 361. And see McCarney v. P., 83 N. Y. 408, 38 Am. R. 456.

9. S. v. Furlong, supra.

10. Lawrence v. S., 4 Yerg. 145. And see Free v. S., 13 Ind. 324.

11. Barnes v. P., 18 Ill. 52, 65 Am. D. 699.

agent or his owner must be called to the non-consent,[21] the better doctrine accepts, as adequate in law, circumstantial evidence and the testimony of other witnesses.[22] The owner's declarations, subsequent to the alleged larceny, are but hearsay, and are not admissible.[23]

§ 753. Fourthly. *The Production of the Stolen Thing:—*

1. **If in Possession of the Officers of the Law,**—the stolen thing may be exhibited to the jury, and the witness may have it in his hands while delivering his testimony.[24] But its presence in court is not legally necessary. Even—

21. S. v. Morey, 2 Wis. 494, 60 Am. D. 439; S. v. Moon, 41 Wis. 684, 686; S. v. Osborne, 28 Iowa, 9, 10, 11; Rex v. Rogers, 2 Camp. 654; Johns v. S., 88 Neb. 145, 129 N. W. 247.

22. McMahon v. S., supra; Erskine v. S., supra; Trafton v. S., 5 Tex. Ap. 480; Foster v. S., 4 Tex. Ap. 246; Welsh v. S., 3 Tex. Ap. 422; Rex v. Allen, 1 Moody, 154; Rex v. Hazy, 2 Car. & P. 458; Schultz v. S., 20 Tex. Ap. 308. And see, as to the principle, C. v. James, 1 Pick. 375; Housh v. P., 24 Colo. 262, 50 Pac. 1036; Ray v. S., 4 Ga. Ap. 67, 60 S. E. 816; Carroll v. P., 136 Ill. 456, 465, 466, 27 N. E. 18; Van Syoc v. S., 69 Neb. 520, 96 N. W. 266; Nixon v. S., 89 Neb. 109, 130 N. W. 1049; George v. U. S., 1 Okla. Cr. 307, 97 Pac. 1052; S. v. Skinner, 29 Ore. 599, 46 Pac. 368; S. v. Faulk, 22 S. Dak. 183, 116 N. W. 72; Wilson v. S., 45 Tex. 76, 78, 23 Am. 602; Files v. S., 36 Tex. Cr. 206, 36 S. W. 93; Jordan v. S., 51 Tex. Cr. 646, 104 S. W. 900; S. v. Wong Quong, 27 Wash. 93, 67 P. 355.

23. Sneed v. S., 4 Tex. Ap. 514. Search by the owner, Rains v. S., 7 Tex. Ap. 588; S. v. Porter, 26 Mo. 201, 207; George v. U. S. (Okla.), 97 Pac. 1052, or statements by accused, P. v. Dean, 58 Hun (N. Y.), 610, 12 N. Y. S. 749, are competent. Opportunity to steal furnished by owner, Warner v. S., 72 Ga. 745, 746; S. v. Hull, 33 Ore. 56, 54 Pac. 159, 72 Am. St. 694n.

24. S. v. Lull, 37 Me. 246; Reg. v. Sargent, 5 Cox, C. C. 499. And see Vol. II, § 965 (1). The jury may not only see it, but examine it with a magnifying glass. Short v. S., 63 Ind. 376; P. v. Tipton, 73 Cal. 405, 14 P. 894; S. v. Pigg, 80 Kan. 481, 103 P. 121. It is not necessary, Moore v. Com., 2 Leigh (Va.), 701, 706; Spittorff v. S., 108 Ind. 171, 172, 8 N. E. 911; S. v. Clark, 27 Utah, 55, 74 Pac. 119, though permissible, Ledbetter v. S., 35 Tex. Cr. 195, 32 S. W. 903; Lue v. Com. (Ky.), 15 S. W. 664; Bryant v. S., 116 Ala. 445, 23 So. 40; Hooten v. S., 53 Tex. Cr. 6, 108 S. W. 651, to produce stolen property. The article must be identified, Buchanan v. S., 109 Ala. 7, 19 So. 410; which is for the jury, Hooten v. S., 53 Tex. Cr. 6, 108 S. W. 651. An opinion as to identity is competent, Misseldine v. S., 21 Tex. Ap. 335, 17 S. W. 768; S. v. Lockwood, 58 Vt.

2. **Sufficient in Degree**—must be the evidence, adequately covering the entire allegation.[29]

Gestae). The defendant's acts and declarations are admissible or not in his favor, according as they are of the res gestae, or otherwise. S. v. Shermer, 55 Mo. 83; Maddox v. S., 41 Tex. 205; Dixon v. S., 2 Tex. Ap. 530; Foster v. P., 18 Mich. 266; S. v. Dellwood, 33 La. Ann. 1229. As to the admission of his acts and declarations against him, see Shaw v. S., 3 Sneed, 86; S. v. Barton, 19 Mo. 227; P. v. Williams, 24 Mich. 156; White v. S., 11 Tex. 769, 773; S. v. Carter, 72 N. C. 99.

Foot-prints. Campbell v. S., 55 Ala. 80; S. v. Reed, 89 Mo. 168, 170, 1 S. W. 225; Bryan v. S., 74 Ga. 393, 394; Holsey v. S., 89 Ga. 433, 434, 15 S. E. 588.

Wagon-tracks. S. v. Folwell, 14 Kan. 105.

Absconding with proceeds. C. v. Hurd, 123 Mass. 438.

Signs and Tokens. The court may refuse to compel a witness to disclose what he knows of the signs and tokens of a class of thieves. S. v. Wilson, 8 Iowa, 407.

Person giving Information. So, from considerations of public policy, the witness from whom the property was stolen will not be required to diclose the names of those on whose information he took steps against the defendant. S. v. Soper, 16 Me. 293, 33 Am. D. 665.

Still Other Questions. For other questions of evidence, see Bennett v. S., 52 Ala. 370; S. v. Kellerman, 14 Kan. 135; S. v. Staples, 47 N. H. 113; P. v. Robles, 34 Cal. 591; C. v. Annis, 15 Gray, 197; Debbs v. S., 43 Tex. 650; Reg. v. Hilditch, 12 Cox, C. C. 131, 2 Eng. Rep. 194; Long v. S., 22 Ga. 40; Rex v. Semple, 1 Leach, 420, 424, 2 East, P. C. 691; Griggs v. S., 58 Ala. 425, 29 Am. R. 762; P. v. Morrigan, 29 Mich. 4.

29. For evidence sufficient and insufficient in law to justiy a conviction, see S. v. Watson, 7 S. C. 67; S. v. Fritchler, 54 Mo. 424; Reg. v. Starr, 40 U. C. Q. B. 268; Reg. v. Walker, Dears. 280, 6 Cox, C. C. 310, 25 Eng. L. & Eq. 568; Gardiner v. S., 33 Tex. 692; Thurman v. S., 33 Tex. 684; McCourt v. P., 64 N. Y. 583; U. S. v. Emerson, 6 McLean, 406; McHenry v. S., 40 Tex. 46; S. v. Vinson, 63 N. C. 335; Pitts v. S., 3 Tex. Ap. 210; Hines v. S., 51 Ga. 301; Moore v. S., 2 Tex. Ap. 350; Smith v. S., 2 Tex. Ap. 477; Walker v. S., 3 Tex. Ap. 70; Brown v. S., 2 Tex. Ap. 139; Macino v. P., 12 Hun, 127; S. v. Hunt, 45 Iowa, 673; S. v. Davis, 9 Vroom, 176, 20 Am. R. 367; Moore v. S., 40 Ala. 49; S. v. Freeman, 72 N. C. 521; Jones v. S., 3 Tex. Ap. 575; S. v. Mitchener, 98 N. C. 689, 4 S. E. 26; Crockett v. S., 14 Tex. Ap. 226; Denmark v. S., 58 Ark. 576, 25 S. W. 867; Johnson v. S., 13 Tex. Ap. 378; S. v. Summers, 38 Minn. 324; Clark v. S., 7 Tex. Ap. 57; Blankenship v. S., 5 Tex. Ap. 218; Shultz v. S., 5 Tex. Ap. 390; Blanford v. S., 115 Ga. 824, 42 S. E. 207; S. v. Hatch, 63 Wash. 617, 116 P. 286.

§ 757. **With Us,**—this statute is early enough in date to be common law. Kilty deems it to have been of force in Maryland till superseded.[32] It is not in the list by the Pennsylvania judges,[33] probably being omitted from some special cause. Later legislation in England has taken its place; and so it has generally with us.

§ 758. *How the Statutes are construed:*—

1. **Being Remedial,**—their construction should be liberal.[34] Hence,—

2. **Taken in Exchange.**—If the thief has bought with the stolen things—for example, stolen bank-bills—other personal property, their owner may maintain trover for the latter.[35] Or, on conviction, the court will order restitution of this property instead of the original stolen things.[36] That the owner can thus follow the stolen goods into land has been both affirmed [37] and denied.[38]

§ 759. **What Larcenies.**—It is perceived that the statute of Hen. 8 by its terms extends both to simply larcenies, and to the compound ones, including robbery; yet to no indictable takings which are only misdemeanor.[39]

§ 760. **Neglect to prosecute.**—It appears that one may debar himself of his rights under this statute of Hen. 8, by dilatoriness and neglects in the prosecution of the offender. For the statute has the words, "in like manner as though

32. Kilty Rep. Stats. 160.

33. Report of Statutes, 3 Binn. 599.

34. Stat Crimes, §§ 120, 192; post, § 761 (2); Golightly v. Reynolds, Lofft, 88.

35. Golightly v. Reynolds, supra; Lance v. Cowan, 1 Dana, 195. And see Scattergood v. Sylvester, 15 Q. B. 506; Horwood v. Smith, 2 T. R. 750; Gimson v. Woodfull, 2 Car. & P. 41.

36. Lance v. Cowan, supra; Rex v. Powell, 7 Car. & P. 640. And see Rex v. Rooney, 7 Car. & P. 515. The Massachusetts court has denied this. C. v. Boudrie, 4 Gray, 418. As to which, see a note to this section in the 2d Ed.

37. Newton v. Porter, 5 Lans. 416.

38. Campbell v. Drake, 4 Ire. Eq. 94.

39. Ante, § 198; Rex v. De Veaux, 2 Leach, 585; s. c. nom. Rex v. Deveaux, 2 East P. C. 789, 839; Parker v. Patrick, 5 T. R. 175. See Robinson v. Dauchey, 3 Barb. 20.

by action. Even a sale in the English market overt does not change this. *A fortiori*, a pawnee cannot hold them against the true owner.[47]

4. **A Third Person**—cannot have the restitution of goods belonging to him, not the prosecutor's, found in the possession of a convicted felon.[48]

5. **No other Court**—than that before which the conviction took place can order the restitution.[49]

§ 763. **Statutes in some of our States**—are in forms differing from the English and ordinary American ones.[50]

II. *The Verdict.*

§ 764. 1. **In the First Volume,**—is explained the general doctrine of the verdict in criminal cases.[51] And—

2. **The Simple Finding of "Guilty"**—convicts the defendant of all that in the indictment is well alleged against him.[52] Hence,—

3. **Value.**—On a charge of stealing articles of values specified, it affirms both that the defendant stole every one of them,[53] and that their several values were as averred. Therefore this form of verdict is adequate.[54] But—

47. Burgess v. Coney, Trem. P. C. 315; Reg. v. Stancliffe, 11 Cox C. C. 318; Scattergood v. Sylvester, 15 Q. B. 506; Reg. v. Sargent, 5 Cox C. C. 499. See Rex v. Stanton, 7 Car. & P. 431.

48. Reg. v. London, Ellis, B. & E. 509; s. c. nom. Reg. v. Pierce, Bell C. C. 235, 8 Cox C. C. 344.

49. Reg. v. London (Law Rep.), 4 Q. B. 371; s. c. nom. Walker v. London, 11 Cox C. C. 280. And see Isaacs v. S., 23 Md. 410; Sullivan v. Robinson, 39 Ala. 613.

50. See C. v. Henley, 1 Va. Cas. 145; Locke v. S., 32 N. H. 106; Gilbert v. Steadman, 1 Root, 403; C. v. Smith, 1 Mass. 245; Jones v. S., 13 Ala. 153. As to Iowa, see S. v. Williams, 61 Iowa, 517, 16 N. W. 586. In Texas, there is a provision for reducing the punishment after a voluntary return of the stolen things. Owen v. S., 44 Tex. 248; Ingle v. S., 1 Tex. Ap. 307; Brill v. S., 1 Tex. Ap. 572; Allen v. S., 12 Tex. Ap. 190.

51. Vol. II, 1000a-1016.

52. Ib. § 1005a (2); English v. S., 29 Tex. Ap. 174; P. v. Perez, 87 Cal. 122, 25 P. 262; P. v. Manners, 70 Cal. 428, 11 P. 643; Lynch v. S., 95 Ark. 168, 128 S. W. 1053; Grant v. S., 125 Ga. 281, 54 S. E. 182.

53. S. v. Somerville, 21 Me. 20.

54. Smith v. S., 60 Ga. 430, 431; Cook v. S., 49 Miss. 8 (explaining some cases, such as Shines v. S.,

omitting such finding is erroneous and to be set aside.[59] But where the purpose of the statute is merely to enable the court to give restitution of the property or a judgment against the defendant for its value, he, not being injured by the omission, cannot, according to what is justly held in Alabama, complain.[60]

§ 767. 1. **If the Proven Values are Less**—than alleged, yet are sufficient to sustain the grade of offense and punishment covered by the indictment, it is within explanations already given to say that the jury may find the verdict which the proofs justify.[61] And—

2. **If Part only of the Goods**—alleged to have been stolen are proved, the verdict may be simply guilty, unless the diminution affects the grade of the offense and punishment.[62] Yet we have a case holding that on proof only of the part, it is error for the judge to tell the jury they may return a general verdict of guilty, though the punishment is the same for the part as for all. For the distinction, it was said, would become important on an application for the restitution of the stolen property; and it was so also for some other reasons.[63] And—

§ 768. 1. **Practical Considerations.**—There are other cases much in accord with the general view last stated; resting, perhaps, on special provisions of statutes;[64] yet showing that it may not be practically just to take verdicts whereby a much heavier weight of guilt will appear to rest on the defendant than was proved. In a case where this appears so, the judge can by some available direction avoid the evil.

59. Ante, § 595; Armstrong v. S., supra; Holmes v. S., 58 Neb. 297, 78 N. W. 641; Kellar v. Davis, 69 Neb. 494, 95 N. W. 1028.

60. Jones v. S., 13 Ala. 153, 157; Case v. S., 26 Ala. 17.

61. Ante, §§ 716, 751; McCorkle v. S., 14 Ind. 39. And see S. v. Bunten, 2 Nott & McC. 441.

62. Ib.; Alderson v. S., 2 Tex. Ap. 10; Harvey v. C., 23 Grat. 941.

63. S. v. Somerville, 21 Me. 20.

64. S. v. Windman, Cheves, 75; S. v. Bunten, 2 Nott & McC. 441; S. v. Kersh, 1 Strob. 352; S. v. Herring, 1 Brev. 159.

2. **If Several Articles**—are alleged to hav
the jury should all be satisfied of the defend
to, at least, some particular one, to justify a
dict of guilty.[65]

§ 769. 1. **For Further Views**—as to the
reader is again referred to the first volume.[66]
responsive to the allegations, in a way affirmat
the defendant guilty.[67]

2. **For Petit Larceny**—a conviction may
indictment for grand larceny; even, if the ju
trary to the evidence.[68] But on an indictment
two for the larceny of the same goods, if the j

65. So the majority of the English judges held where the charge was the larceny of great numbers of each one of all the current coins. The proof showed a stealing of coin in general, but it did not particularize the denomination of any one coin. The judge, to save the question of law, told the jury they might find a verdict of guilty, if satisfied that the defendant stole money "consisting of some of the coins mentioned in the indictment, although they could not saay which." The majority, in an opinion delivered by Alderson, B., Erle, J., dissenting, held this to be wrong. Reg. v. Bond, 1 Den. C. C. 517, 4 Cox, C. C. 231, 3 Car. & K. 337. It seems to me quite plain that the majority were right. The law requires the allegation to be specific as to the thing stolen, and the finding to be responsive to the charge. To simplify this question, let us suppose the accusation to be of stealing a saddle and bridle; and six of the jury to be satisfied that the defendant stole the saddle, and left the bridle untouched, while six believe that he took
did not touch the
the twelve do not
opinion that he sto
that he stole the b
stole both. Or, if
that the defendant
and six are satisfie
that A is alive, wal
and six that B is a
streets, is the opi
among the twelve t
that B is dead, o
dead?

66. Vol. II, § 10
Stebbins, 8 Gray, 4
Iowa, 540; Shaw v.
McEntee v. S., 24
v. P., 2 Abb. Ap. 83.

67. Warren v.
(Iowa), 106; S. v
C. 209; S. v. Howa

68. S. v. Bennet
3 Brev. 515. And
1 Mill, 29; S. v. M
498; Stroup v. C.,
754; Doty v. S., 6 E
Spurgin, 1 McCord,
S., 66 Ala. 468.

each stole all, they cannot reduce the value as to one and not as to the other, declaring the one guilty of petit larceny and the other of grand; because this would be repugnant.[69]

III. *Other Questions.*

§ 770. 1. **Elsewhere,**—in the first volume,[70] and in another place in this chapter,[71] we saw what is the county for the prosecution.[72]

2. **Other Question**—of practice are explained in the first volume.

69. S. v. Wilson, 3 McCord, 187. The following form of the verdict is held adequate: "We, the jury, find the prisoner, Rich'd Poindexter, guilty of petty larceny." Poindexter v. C., 6 Rand. 667.

70. Vol. I, § 46 et seq., 59, 60.

71. Ante, § 727.

72. And see Rex v. Simmonds, 1 Moody, 408; P. v. Honeyman, 3 Denio, 121; Reg. v. Hinley, 2 Moody & R. 524. As to larceny in one State or county and the goods carried by the thief into another, see New Crim. Law, I, §§ 137-142; ante, § 727; Vol. I, §§ 59, 60.

CHAPTER CXXXVII.

LARCENY, COMPOUND.

Consult—the places referred to introducing c. 39.

§ 771. **How Chapter divided.**—We shall co General Doctrine; II. Larcenies by Particul Persons; III. Larcenies from Particular Pla cenies from the Person.

I. *The General Doctrine.*

§ 772. 1. **A Compound Larceny**—is a la vated by some attendant fact which, in law, enormity.[73] Hence,—

2. **The Indictment**—for it consists of the a simple larceny, enlarged by averring the s Still,—

§ 773. 1. **A Statute**—is sometimes in ter construed to create a new larceny througho the compound one. Then the indictment shou low the statute. Thus,—

2. **For Robbing a Mail-bag of Letters,**—t was in an Irish case held good, though it omi mon law averment of asportation; for, the ju "the statute constituted a new species of off not refer certain acts to a known species of c this indictment covered entire the statutory

73. New Crim. Law, II, §§ 892, 893.

74. Dir. & F., § 583. See, for forms, Ib., §§ 584-600; 3 Chit Crim. Law, 984-988; Archb. Crim. Pl. & Ev. (19th Ed.), 38 424, 433-441, 444-44 U. S., 2 Colo. 186; ton, 7 B. & C. 463.

75. Rex v. Ro 51.

§ 774. **The Evidence**—consists of proving the larceny, as shown in a preceding chapter, and the special fact.

II. *Larcenies by Particular Classes of Persons.*

§ 775. **Where a Clerk or Servant**—of the owner of the goods is the thief,—as, in England, under 7 & 8 Geo. 4, c. 29, § 46 (re-enacted in 24 & 25 Vict. c. 96, § 67), providing a special punishment if he "shall steal any chattel, money, or valuable security, belonging to or in the possession or power of his master,"—it is good to say that on, etc., at, etc., A "was clerk to B," and afterward while he was such clerk on, etc., at, etc., certain specified goods, of specified values, "of and belonging to the said B, his master," as in simple larceny, "then and there feloniously did steal, take, and carry away.".[76]

§ 776. **The Evidence**—must show the legal relation of clerk and master,[77] and the master's relation to the goods;[78] that is, his ownership, possession, or power over them. To which should be added the ordinary proofs in larceny.

§ 776 a. **Larcenies by Post-office Employees**—and embezzlements by them are, as to both indictment and proofs, within the like principles.[79]

III. *Larcenies from Particular Places.*

§ 777. **Breaking into a Church**—and stealing "therein any chattel" was in England made specially punishable by 7 & 8 Geo. 4, c. 29, § 10 (re-enacted in 24 & 25 Vict. c. 96, § 50). And it was good to aver than on, etc., at, etc., the

76. Archb. Crim. Pl. & Ev. 10th Lond. Ed. 194, 19th Ed. 383; Dir. & F., §584. And see Rex v. Somerton, 7 B. & C. 463.

77. Ante, § 341; New Crim. Law, II, §§ 332-351; Stat. Crimes, § 271; Rex v. Haydon, 7 Car. & P. 445; Quarman v. Burnett, 6 M. & W. 499.

78. Rex v. Sullens, 1 Moody, 129; Rex v. Murray, 1 Moody, 276.

79. U. S. v. Patterson, 6 McLean, 466; U. S. v. Okie, 5 Blatch. 516; U. S. v. Laws, 2 Low. 115; U. S. v. Jenther, 13 Blatch. 335; U. S. v. Taylor, 1 Hughes, 514; U. S. v. Winter, 13 Blatch. 333; U. S. v. Lancaster, 2 McLean, 431; Farnum v. U. S., 1 Colo. 309; U. S. v. Clark, Crabbe, 584; Goodwin's Case, 1 Lewin, 100.

2. **Some Questions of Evidence**—and variance have arisen, presenting nothing not obvious.[87]

87. Reg. v. Wilkinson, 10 Cox C. C. 363; King v. S., 54 Ga. 184; P. v. Morrigan, 29 Mich. 4; De Gaulite v. S., 31 Tex. 32; Fanhigan v. S., 66 Ga. 167; P. v. Wiggins, 92 N. Y. 656; Wilson v. S., supra; Hall v. P., 39 Mich. 717.

For Lewdness, see Bawdy-house; Exposure of Person, etc. And see various titles in Stat. Crimes.

CHAPTER CXXXVIII.

LIBEL AND SLANDER.

Consult—for the law of this offense, New Crim. Law, II, §§ 905-949. For forms and the like, Dir. & F., §§ 617-639. And see for miscellaneous questions, the indexes to this series of books.

§ 781. **There are Helpful Analogies**—between civil and criminal suits for libel, some of which will be suggested as we proceed, and others will occur to the reader.

§ 782. **How Chapter divided.**—We shall consider, I. The Indictment generally and for libelling Individuals; II. The Indictment specially as to other Forms of Libel; III. The Evidence; IV. Questions of Practice; V. Oral Words.

I. *The Indictment generally and for libeling Individuals.*

§ 783. 1. **Criminal Prosecutions**—for libel were more used in former times than now; and then passion and prejudice greatly influenced the allegations. So that the precedents for it in our books are not in general modern; and they contain more or less that is alike needless and to good taste offensive. Thus,—

2. **Old Rubbish.**—In former times it was the common way for the indictment to charge that the defendant made the publication "not having the fear of God before his eyes, but being moved by the instigation of the devil;"[88] and most of our precedents aver that he did it "with force and arms,"—words not only useless,[89] but ridiculously inap-

88. 3 Chit. Crim. Law, 878. As to which, see Vol. II, § 501.

89. Vol. II, § 502 (1); Rex v. Burks, 7 T. R. 4.

propriate.[90] Then we have a sort of introductory malediction of the defendant, still retained in our forms; as, in the late expurgated editions of Archbold, it is set down for the pleader to say, after the manner of former ages, that the defendant, "contriving, and unlawfully, wickedly, and maliciously intending to injure, vilify, and prejudice one B, and to deprive him of his good name, fame, credit, and reputation, and to bring him into public contempt, scandal, infamy, and disgrace," did, etc., proceeding to allege the doings and intent which in law constitute the offense.[91] Plainly this introduction is useless,[92] hence the better practice is to omit it.

3. **The Substantial Allegations**—may be that on, etc., at, etc., A did unlawfully and maliciously write and publish,[93] of any concerning one X, and of and concerning [here set out the facts necessary to a due understanding of the libel and the innuendoes to be introduced into the recitation of it], a false, scandalous, and malicious libel [adding, if the pleader chooses, "in the form of a book," *or* "in the form of a hand-bill," *or* "in the form of a letter," etc., but nothing of this is believed to be necessary],[94] of the tenor

90. Dir. & F., §§ 43, 44. It has been held unnecessary in an indictment for criminal libel to allege that the language as set out tends to hold the party up to hatred and contempt. P. v. Fuller, 238 Ill. 116, 87 N. E. 236.

91. Archb. Crim. Pl. & Ev. (19th Ed.), 915. All the late editions of this work of Archbald's are by other editors. In his New Crim. Pro. 316, the author himself omits this allegation.

92. Ante, §§ 304 (2), 401 (1), note; Coleman v. Southwick, 9 Johns. 45, 6 Am. D. 253. The modern statutes providing that the indictment may state the offense in ordinary language so that a person of common understanding may know what is intended is applicable to criminal libel or defamation. Butler v. S., 162 Ala. 71, 50 So. 400; Brooke v. S., 154 Ala. 53, 45 So. 622. See S. v. Mitchell, 132 N. C. 1033, 43 S. E. 938.

93. It is not unfrequently added here, "and cause and procure to be written and published." These words, when thus coupled to the others by "and," are not legally objectionable. They do not make the count double. But it is practically better to omit them. Vol. I, §§ 434 (3) 435; Vol. II, § 485; ante, §§ 224, 438, 647.

94. See S. v. Dowd, 39 Kan. 412; P. v. Stark, 136 N. Y. 538, 32 N. E. 1046; Rattray v. S., 61 Miss. 377; Crowe v. P., 92 Ill. 231; In re

following [*or*, if not all the libelous publication is to be given, say, "one part whereof is of the tenor following," setting out the words, with the needful innuendoes; "another part whereof is of the tenor following," and so on], setting out the words and figures accurately, and explaining them by innuendoes when necessary; he, the said A, then and there well knowing the said scandalous and malicious libel to be false, an averment [95] which would seem not to be necessary.[96]

§ 784. 1. **The Name of the Person libelled,**—it is perceived, is alleged more nearly after the manner in forgery [97] than in larceny; as, if the libel is on numbers of persons, the names of all are not indispensable.[98]

2. **No Addition or Place of Residence**—need be given.[99] But—

3. **A Libel charging Misconduct in Office**—should aver the official character.[1]

4. **"Write"—"Publish."**—It suffices to say that the defendant published the libel, not adding that he wrote it.[2] The effect of the word "write" alone is not so clear on the authorities. In principle, it is not good; but it is good to

Kowlasky, 73 Cal. 120, 14 P. 399; S. v. McIntosh, 92 N. C. 794.

95. Hunt v. Bennett, 19 N. Y. 173, 176; S. v. Barnes, 32 Me. 530; Rowe v. Roach, 1 M. & S. 304.

96. Archb. Crim. Pl. & Ev. ut sup., Archb. New Crim. Pro. ut sup.; 3 Chit. Crim. Law, ut sup.; Dir. & F., § 619, where a general form of the indictment and multitudes of authorities are given. C. v. Morgan, 107 Mass. 199; Tabart v. Tipper, 1 Camp. 350, 353; Reg. v. Yates, 12 Cox C. C. 233, 4 Eng. Rep. 523; Lake v. King, 1 Saund. Wms. Ed. 120 and note; Anonymous, Trem. P. C. 68; Rex v. Horne, Cowp. 672, 20 How. St. Tr. 651; Lawson v. Hicks, 38 Ala. 279, 81 Am. D. 49; Reid v. S., 53 Ala. 402, 25 Am. R. 627; Reg. v. Munslow, 1895, 1 Q. B. 758; P. v. Jackman, 96 Mich. 269, 55 N. W. 809; Robinson v. S., 108 Md. 644, 71 A. 433. See, also, P. v. Parsons, 163 Mich. 329, 17 Det. Leg. N. 780, 128 N. W. 225.

97. Ante, §§ 420, 424.

98. Rex v. Griffin, 7 Mod. 197; S. v. Heacock, 106 Iowa, 191, 76 N. W. 654.

99. Ante, § 506 and note, 718 (3); S. v. Barnes, 32 Me. 530; C. v. Varney, 10 Cush. 402.

1. Rex v. Hatfield, 4 Car. & P. 244.

2. Taylor v. S., 4 Ga. 14; Rex v. Hunt, 2 Camp. 583.

aver that he wrote the libel with intent to publish it.[3] So,—

5. **Delivered only to Person libelled.**—In law, it is an offense simply to write a libel of one and send it to him, not making it known to any third person;[4] yet the indictment should add the defendant's intent to provoke the one libelled to a breach of the peace.[5]

§ 785. **Colloquium.**—It must always be averred, either in terms or by their equivalent, that the libellous words were "of and concerning" the defamed person.[6] And—

§ 786. **"Of and concerning" the Subject**—should be added, not always,[7] but where the words to appear affirmatively complete and full as a libel must be contemplated in connection with some extrinsic fact or matter, to which they refer, or of which they are the subject, or which otherwise is essential to a comprehension of their import; and this averment should be direct, not, for example, in the form of an innuendo.[8] Now,—

3. New Crim. Law, II, §§ 926, 927, 948, 949.

4. New Crim. Law, II, § 927; S. v. Lund, 80 Kan. 240, 101 P. 1000.

5. Vol. II, § 521 (2), note; Rex v. Wegener, 2 Stark. 245; Hedges v. S., 5 Humph. 112. See S. v. Armstrong, 106 Mo. 395, 27 Am. St. 361, 16 S. W. 604; Wilcox v. Moon, 64 Vt. 450, 33 Am. St. 936; Reg. v. Adams, 22 Q. B. D. 66, 16 Cox C. C. 544.

6. S. v. Brownlow, 7 Humph. 63; Rex v. Marsden, 4 M. & S. 164; S. v. Henderson, 1 Rich. 179. And see Ellis v. Kimball, 16 Pick. 132; Wilson v. Hamilton, 9 Rich. 382; S. v. Elliott, 10 Kan. Ap. 69, 61 P. 981; Com. v. Swallow, 8 Pa. Super. Ct. 539. See, for words adjudged adequate as an equivalent, Taylor v. S., 4 Ga. 14. For words adjudged not to be an equivalent, see Rex v. Marsden, 4 M. & S. 164.

7. Croswell v. Weed, 25 Wend. 621; S. v. Osborn, 54 Kan. 473, 38 P. 572; S. v. Lomack, 130 Iowa, 79, 106 N. W. 386; Com. v. Duncan, 31 Ky. L. 1277, 104 S. W. 997.

8. S. v. Neese, N. C. Term. R. 270; S. v. Henderson, 1 Rich. 179; S. v. Atkins, 42 Vt. 252; Miller v. Maxwell, 16 Wend. 9; Davis v. Davis, 1 Nott & McC. 290; Wilson v. Hamilton, 9 Rich. 382; Chenery v. Goodrich, 98 Mass. 224; Goodrich v. Davis, 11 Met. 473, 480; Caldwell v. Raymond, 2 Abb. Pr. 193; Rex v. Horne, Cowp. 672, 4 Bro. P. C. 368; Rex v. Rossewell, 2 Show. 411; P. v. Jackman, 96 Mich. 269, 55 N. W. 809; S. v. Pulitzer, 12 Mo. Ap. 6; S. v. Spear, 13 R. I. 324.

tenor. This averment is essential.[15] In England the Court of Queen's Bench sustained an indictment charging simply the publishing of "a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book, called 'Fruits of Philosophy,' thereby contaminating," etc., the public morals; setting out no words, and averring no reason for the omission.[16] This decision was reversed on appeal. The appellate court consisted of three judges, the American doctrine was not before it, nor in any form was the idea of alleging the too great obscenity in excuse; but the judges were emphatic in deeming that justice requires the words equally of obscene libels as of other, and that nothing essential to the justice of a cause can pollute the judicial record.[17]

§ 791. Not the Whole Libel,—but only so much of it as the prosecutor will rely on at the trial need be set out. Then, if the defendant claims that other parts qualify those recited, he may have them read to the jury.[18] Hence the recital of the libel may omit a date and signature at the end.[19] But an omission which varies the sense of the parts

15. C. v. Tarbox, 1 Cush. 66; S. v. Brown, 27 Vt. 619; C. v. Holmes, 17 Mass. 336; McNair v. P., 89 Ill. 441; P. v. Hallenbeck, 52 How. Pr. 502; S. v. Hayward, 83 Mo. 299; Bates v. U. S., 11 Bis. 70; U. S. v. Clarke, 40 Fed. 325; McNair v. P., 89 Ill. 441; S. v. Smith, 17 R. I. 371; P. v. Hallenbeck, 2 Abb. N. Cas. 66. And see S. v. Hanson, 23 Tex. 232; S. v. Smith, 7 Lea, 249; U. S. v. Watson, 17 Fed. 145; Fuller v. P., 92 Ill. 182; S. v. Pennington, 5 Lea, 506; P. v. Girardin, 1 Mich. 90. From the last cited case, even the averment of the excuse might seem not to be required. But this, if meant, is contrary alike to the other decisions and to correct principle.

16. Reg. v. Bradlaugh, 2 Q. B. D. 569, 21 Eng. Rep. 269.

17. Bradlaugh v. Reg., 3 Q. B. D. 607; Brooke v. S., 154 Ala. 53, 45 So. 622. The reasoning in Rex v. Carlile, 3 B. & Ald. 167, not on this exact question, seems in accord with this view.

18. Rex v. Bear, 2 Salk. 417; Weir v. Hoss, 6 Ala. 881; McCombs v. Tuttle, 5 Blackf. 431; Rutherford v. Evans, 6 Bing. 451, 4 Car. & P. 74.

19. C. v. Harmon, 2 Gray, 289; Rex v. Lambert, 2 Camp. 398. And see Rex v. Johnson, 2 Show. 488; Walker v, Brogden, 19 C. B. n. s. 65. In this way, the trial is, and it should be in fact, upon the entire writing, not upon a part. Morehead v. Jones, 2 B. Monr. 210, 36 Am. D. 600. This may even extend to other papers, to which the writ-

given will be fatal at the hearing.[20] not constitute a libel, the defect ca other parts.[21]

§ 792. 1. **Correctly**—must the p recited.[22] We have seen what is t introducing them.[23]

2. **For a Foreign Language**—we

§ 793. **An Innuendo**—is an expla meaning.[25] It charges no fact, and being sustained by evidence.[26] Aft *colloquium*[27] and elsewhere, has s things he desires, he then introduce the libellous words, when it will be standing of them, the expression "m this is called an innuendo. Allegi adds to nor qualifies any previous for example, a word has two signi ceding averments have laid the fo

ing refers. Rex v. Slaney, 5 Car. & P. 213.

20. Cartwright v. Wright, 5 B. & Ald. 615. And see Bell v. Byrne, 13 East, 554.

21. C. v. Snelling, Thacher Crim. Cas. 318. Proof of more words than set out is no variance, S. v. Lund, 80 Kan. 240, 101 P. 1000. See Miller v. S., 81 Ark. 359, 99 S. W. 533.

22. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 525, referring to Wright v. Clements, 3 B. & Ald. 503; Tabart v. Tipper, 1 Camp. 350; Cartwright v. Wright, 1 D. & R. 230.

23. Ante, § 783 (3); Archb. ut sup.; Lake v. King, 1 Saund. Wms. Ed. 120 and note; Tabart v. Tipper, 1 Camp. 350, 353.

24. Vol. II, § 564; Zenobio v. Axtell, 6 T. R. 162; Rex v. Peltier, 28 How. St. Tr. 529; Kiene v. Ruff, 1 Iowa, 482; Hickley v. Grosjean, 6 Blackf. Ap. 420

25. s. c. no Raym. v. Hor stein v. Van Ve 211; Bl Pr. 446,

26. Van Ve 211, 22 Aler, 3

27.

28. Thomas James onymou well, 3 borough Morgan, cott, 54

claimed, the innuendo may say that this is the one meant.[29]

§ 794. **No Innuendo is required**—if the meaning and application of the words claimed to be libellous are plain.[30] But the doctrine appears to be that whenever the allegation of extrinsic facts is necessary in explanation, there must be an innuendo, the effect whereof is to connect those facts and the libelous words, unless other allegations supply the connection.[31] Whether or not the meaning of the libel is that stated in the innuendo is a question of fact for the jury.[32] So that where the innuendo is purely explanatory, not going beyond what is alleged, whether necessarily introduced or not,[33] the jury must be able to give to the libel, or enough of it to constitute an offense, the meaning which the pleader does, to justify a conviction.[34] On the other hand, an innuendo introducing new and superfluous matter,[35] or repugnant and insensible,[36] may be rejected as surplusage.[37]

29. Gosling v. Morgan, 32 Pa. 273; Griffiths v. Lewis, 8 Q. B. 841; Boydell v. Jones, 4 M. & W. 446; Woods v. S., 58 Tex. Cr. 103, 124 S. W. 918.

30. Rex v. Horne, Cowp. 672, 678; Woolnoth v. Meadows, 5 East, 463, 469; Gage v. Shelton, 3 Rich. 242; S. v. Kountz, 12 Mo. Ap. 511; S. v. Conklin, 47 Ore. 509, 84 P. 482; Benton v. S., 59 N. J. L. 551, 36 A. 1041; McKie v. S., 37 Tex. Cr. 544, 40 S. W. 305; Kelly v. S., 24 Ind. Ap. 639, 57 N. E. 257.

31. 1 Chit. Pl. 407; Goldstein v. Foss, 6 B. & C. 154; Clement v. Fisher, 7 B. & C. 459; Rex v. Marsden, 4 M. & S. 164; Williams v. Gardiner, 1 M. & W. 245; Smith v. Gaffard, 33 Ala. 168; Brittain v. Allen, 3 Dev. 167; Lindsey v. Smith, 7 Johns. 359; S. v. O'Hagan, 73 N. J. L. 209, 63 A. 95.

32. S. v. Smily, 37 Ohio St. 30, 41 Am. R. 487. See S. v. Mott, 16 Vroom, 494.

33. But see Gage v. Shelton, 3 Rich. 242.

34. Smith v. Carey, 3 Camp. 461; Day v. Robinson, 1 A. & E. 554, 558; Sellers v. Till, 4 B. & C. 655; Prudhomme v. Fraser, 2 A. & E. 645; note to Craft v. Boite, 1 Saund. (6th Ed.) 241, 243, 243a, and other cases there cited; Dottarer v. Bushey, 16 Pa. 204.

35. Roberts v. Cambden, 9 East, 93; Wilner v. Hold, Cro. Car. 489; Thomas v. Croswell, 7 Johns. 264, 272, 5 Am. D. 269; S. v. Farley, 4 McCord, 317; Barnes v. S., 88 Md. 347, 41 A. 781.

36. Smith v. Cooker, Cro. Car. 512.

37. **Further of Innuendo.** Questions under this head so often embarrass a practioner that I propose to add a few illustrations from Archbold. Thus: "In an action on the case against a man for saying of another 'he has burnt my barn,'

II. *The Indictment specially as to othe*

§ 794 a. 1. Obscene Libels,—as to 1 forms of the procedure, do not differ ess

the plaintiff cannot, by way of innuendo, say, 'meaning my barn full of corn;' Barham v. Nethersal, 4 Co. 20a; because this is not an explanation derived from anything which preceded it on the record, but from the statement of an extrinsic fact which had not previously been stated. But if, in the introductory part of the declaration, it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, he had spoken the above words of the plaintiff, an innuendo of its being the barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete. So, in an action for the words 'He is a thief,' you cannot explain the defendant's meaning in the use of the word 'he,' by an innuendo 'meaning the said plaintiff,' or the like, unless something appear previously upon the record to ground that explanation; but, if you had previously charged the words to have been spoken of and concerning the plaintiff, then such an innuendo would be correct; for, when it is alleged that the defendant said of the plaintiff 'He is a thief,' this is an evident ground for the explanation given by the innuendo that the plaintiff was referred to by the word 'he.' See 1 Rol. Abr. 83, pl. 7, 85, pl. 7; 2 Rol. 244; Johnson v. Alymer, Cro. Jac. 126; Kellan v. Manesby, Cro. Jac. 39, 1 Sid. 52; Lampen v. Hatch, 2 Stra. 934, 1 Saund. 242, n. 3; Gold-

stein v. Fos
& C. 154; Cl
& R. 281, 7
v. Angle, 1
v. Brittlebar
nom. Tomli
Nev. & M. 4
5 B. & Ad.
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5 Harg. St.
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on individuals.[38] They differ in the law chiefly in that the former the injurious to the public morals,[39] while the latter tend to create breaches of the peace.[40]

2. **As to the Indictment,**—we have seen how the obscene matter is to be set out.[41] The form for it in other respects requires no special observation.[42]

3. **The Destruction**—of the obscene matter is in England and in some of our States authorized by statutes, not necessary to be here particularized.[43]

§ 794 b. **Where an Obscene Picture**—is the libel, instead of words, it can be only described—there is no tenor.[44] The description must be reasonably identifying, yet need not be indecent in detail.[45] Thus, the expression "a certain

and to what? But in the introductory part of the information the libel was charged to have been written 'of and concerning the Pretender, and of and concerning his right to the crown of Great Britain;' and it was holden that the innuendoes in the body of the libel, explaining the words 'Chevalier,' etc., to mean the Pretender, and his hereditary right to the crown of Great Britain, when connected with the averment in the introductory part, of its being written, 'of and concerning the Pretender and his right to the crown of Great Britain,' were a sufficient explanation to make good the charge. But where the words or libel are in the second person, and the slander is spoken or the libel is directed to the party slandered or libelled, and it is so alleged in the indictment,—as where a declaration charges that the defendant, in a discourse with the plaintiff, said to him, 'You are a thief,'—it is unnecessary to aver that they were spoken or written of and concerning the plaintiff; nor is there any need of an innuendo, for it is plain enough without it that 'you' means the plaintiff. Skutt v. Hawkins, 2 Rol. 243, 244; and see 1 Rol. Abr. 85, pl. 8." Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 525, 526.

38. Bradlaugh v. Reg., 3 Q. B. D. 607.

39. New Crim. Law, I, § 500; II, § 943.

40. New Crim. Law, I, § 591 (4).

41. Ante, § 790; Reyes v. S., 34 Fla. 181.

42. For forms, see Bradlaugh v. Reg., supra; C. v. Tarbox, 1 Cush. 66; C. v. Holmes, 17 Mass. 336. And see P. v. Special Sessions, 10 Hun, 224; C. v. Wright, 139 Mass. 382, 1 N. E. 411.

43. New Crim. Law, I, § 309 (2); Ex parte Bradlaugh, 3 Q. B. D. 509; Reg. v. Hicklin (Law Rep.) 3 Q. B. 360; Steele v. Brannan (Law Rep.), 7 C. P. 261; Attorney-General v. Municipal Court, 103 Mass. 456, 463; Reg. v. Truelove, 5 Q. B. D. 336, 14 Cox C. C. 408.

44. Observations in Bradlaugh v. Reg., 3 Q. B. D. 607, 634.

45. Barker v. C., 19 Pa. 412.

2. **The Innuendoes,**—we have seen,[53] are of a nature not to admit of proof; while yet the jury must be satisfied that the libellous words mean what the innuendoes say they do, —a question not for the judge.[54] And—

3. **Further as to Meaning.**—As expressed by Lord Mansfield, "it is the duty of the jury to construe plain words, and clear allusions to matters of universal notoriety, according to their obvious meaning, and as everybody else who reads must understand them. But the defendant may give evidence to show that in the case in question they were used in a different, or in a qualified sense. If no such evidence is given, the obvious meaning to every man's understanding must be decisive."[55]

§ 800. **The Publication**—of the libel must be proved. Regularly the proof should precede the reading of it to the jury.[56] But this is matter of practice, within the discretion of the presiding judge, whose direction is ordinarily conclusive.[57] The proofs will vary with the case.[58] For

Ad. 1081; Mix v. Woodward, 12 Conn. 262; Southwick v. Stevens, 10 Johns. 443.

53. Ante, § 793.

54. Ante, § 794; C. v. Keenan, 67 Pa. 203; Rex v. Withers, 3 T. R. 428; Rex v. Dean of St. Asaph, 3 T. R. 428, note; s. c. nom. Rex v. Shipley, 4 Doug. 73; Rex v. Woodfall, 5 Bur. 2661, 2666; S. v. White, 6 Ire. 418; S. v. Mason, 26 Ore. 273, 38 Pac. 130, 46 Am. St. 629, 26 L. R. A. 779n; Whitehead v. S., 39 Tex. Cr. 89, 45 S. W. 10; R. v. Ritchie, 12 Utah, 180, 42 Pac. 209; Enquirer Co. v. Johnston, 72 Fed. 443, 18 C. C. A. 628.

55. Rex v. Horne, 20 How. St. Tr. 651, 774. Compare with New Crim. Law, II, § 924. And see Hawks v. Patton, 18 Ga. 52; Van Vechten v. Hopkins, 5 Johns. 211; McLaughlin v. Russell, 17 Ohio, 475; S. v. Fitzgerald, 20 Mo. Ap. 408. Defendant cannot show what he meant. Ordinary meaning of language is conclusive, P. v. Strauch, 153 Ill. Ap. 544, 93 N. E. 126.

56. Taylor v. S., 4 Ga. 14; McCombs v. Tuttle, 5 Blackf. 431.

57. Vol. II, §§ 966-966b; Taylor v. S., supra.

58. New Crim. Law, I, §§ 219-221; Rex v. Topham, 4 T. R. 126; Reg. v. Lovett, 9 Car. & P. 462; Rex v. Donnison, 4 B. & Ad. 698; Mayne v. Fletcher, 4 Man. & R. 311; Rex v. Hart, 10 East, 94; Rex v. Amphlit, 6 D. & R. 125, 4 B. & C. 35; Lawson v. Hicks, 38 Ala. 279, 81 Am. D. 49; S. v. Jeandell, 5 Harring. (Del.) 475; McCombs v. Tuttle, supra; C. v. Blanding, 3 Pick. 304, 15 Am. D. 214; Cochran v. Butterfield, 18 N. H. 115, 45 Am D. 363; Woodburn v.

2. **Other Instances**—of like publications may be introduced in proof of express malice.[65]

§ 802. **As to the Day of Publication,**—when the charge is simply, as in prudence it ought to be, that the defendant published the libel on a day named, proof of any other within the Satute of Limitations will suffice.[66] But if, needlessly specific, it adds the date of a newspaper wherein the libel appeared, no other date will satisfy this averment.[67]

§ 803. **While a Witness need not Criminate Himself,**—Lord Tenterden, C. J. ruled that he must answer whether or not he knows who wrote the libel. If he says he does, he cannot be required to name the person; for "it may be himself."[68]

§ 804. **The Official Character**—of one libelled in respect of official doings, is sustained by evidence that he acted in the office,[69] or by admissions in the libel itself or otherwise.[70] "But," says Archbold, "if the effect of the libel be to charge the prosecutor with having acted as such officer or professional man without a legal appointment,—

65. Rex v. Pearce, Peake, 75; S. v. Jeandell, 5 Harring. (Del.) 475; S. v. Riggs, 39 Conn. 498; C. v. Place, 153 Pa. 314, 26 A. 620. See White v. Sayward, 33 Me. 322; Usher v. Severance, 20 Me. 9, 37 Am. D. 33; Riley v. S., 132 Ala. 13, 31 So. 731; Cox v. S., 161 Ala. 66, 50 So. 398; Grant v. S., 141 Ala. 96, 37 So. 420; Eldridge v. S., 27 Fla. 162, 9 So. 448; S. v. Conable, 81 Iowa, 60, 46 N. W. 759; S. v. Heacock, 106 Iowa, 191, 76 N. W. 654; Com. v. Damon, 136 Mass. 441; Com. v. Harmon, 2 Gray (Mass.) 289; S. v. Mills, 116 N. Car. 1051, 21 S. E. 563; Adams v. S. (Tex. 1911), 138 S. W. 117; Manning v. S., 37 Tex. Cr. 180, 39 S. W. 118.

66. Vol. I, § 386 et seq.

67. Vol. I, § 401; C. v. Varney, 10 Cush. 402.

Court or Jury. As to whether a question of variance is for the judge or jury, see S. v. Jay, 5 Vroom, 368.

68. Rex. v. Slaney, 5 Car. & P. 213.

69. Vol. II, § 1130; Reg. v. Boaler, 17 Cox C. C. 569. If the libel consists of a statement that a public official is shielding a criminal, it need not be alleged that it was his duty to prosecute the criminal. Collins v. P., 115 Ill. Ap. 280.

70. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 615, 616; Berryman v. Wise, 4 T. R. 366; Smith v. Taylor, 1 New Rep. 196, 208; Jones v. Stevens, 11 Price, 235; Pearce v. Whale, 5 B. & C. 38.

as, for instance, if a man libel a physician by a quack,—it seems necessary to prove the app admission."[71]

IV. *Questions of Practice.*

§ 805. **The County**—wherein the offence is t committed has already been shown.[72] So—

§ 806. 1. **The Verdict,**—explained in the f is the same in this offence as in others.[73] And-

2. **Special.**—Though, as we have seen,[74] r general sufficiently presumed from the publishi verdict [75] should include a finding of the malic

3. **Imperfect.**—In England, when the questi was held to be for the court to the exclusion of finding of "guilty of printing and publishing adjudged to be an imperfect verdict,[77] not a So that a *venire de novo* was awarded.[78]

§ 806 a. **Impounding Libel.**—In one case, th sisting of letters from the defendant to the pros

71. Archb. ut sup. referring to Smith v. Taylor, supra; Yrisarri v. Clement, 3 Bing. 432, 11 Moore, 308; Rex v. Sutton, 4 M. & S. 532, 548; Collins v. Carnegie, 1 A. & E. 695.

72. Vol. I, §§ 53 (4), 57 (4), 64; C. v. Blanding, 3 Pick. 304, 15 Am. D. 214; Rex v. Burdett, 3 B. & Ald. 717, 4 B. & Ald. 95; Rex v. Johnson, 7 East, 65, 3 Smith, 94; Rex v. Watson, 1 Camp. 215; Rex v. Williams, 2 Camp. 506; In re Palliser, 136 U. S. 257; In re Kowalsky, 73 Cal. 120; C. v. Dorrance, 14 Philad. 671; S. v. Huston, 19 S. D. 644, 104 N. W. 451.

73. Vol. II, § 1000a et seq.

74. Ante, § 801 (1).

75. Vol. II, §§ 1006-1008.

76. McAdams v. Reney, 4 Hayw. 252; S. v. Allen, 1 M Am. D. 687; Webber 4. And see Sharff 514.

77. Vol. II, §§ 100

78. Rex v. Woo 2661. Lord Mansfiel livering the opinion "If they [the jury] 'only'] to say 'they d a libel,' or 'did not thets,' or 'did not fin malicious intent,' it fect the verdict; be these things were to found either way. If meant to say 'that th the meaning put upo the information, the acquitted him." p. 266

79. Rex v. Cator,

former at the sentence moved that the latter be required to deposit them with the officer of the court. This motion the judges denied as unprecedented and unfit, and doubted the authority.[80]

V. *Oral Words.*

§ 807. **For Words spoken to a Magistrate,**—an approved form of the indictment is to say that on, etc., at, etc., setting out a judicial proceeding before him, the defendant, contriving and intending to vilify him, and to bring the administration of justice into contempt, and while specified magisterial acts were transpiring, did then and there, in his presence and hearing, wickedly and maliciously "publish, utter, pronounce, declare, and say, with a loud voice," to the magistrate while so acting officially, "You are a scoundrel and a liar, you would hang your own father if you could make a groat by his execution." [81]

§ 808. 1. **Oral Blasphemy**—is considered in another place.[82]

2. **Obscene Oral Words**—must by some opinions be set out by their tenor, and proved as laid.[83] Others permit this rule to be departed from.[84] In Tennessee, it was deemed unnecessary to allege or prove the words strictly in form as uttered.[85]

80. Rex v. Cator, 2 East, 361.

81. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 588, 589. For the law applicable to such a case, this author refers to Rex v. Pocock, 2 Stra. 1151; Rex v. Weltje, 2 Camp. 142; Reg. v. Langley, 2 Salk. 697; Reg. v. Wrightson, 2 Salk. 698. These words, as set out, are not simply indictable slander, but they are more particularly an indictable contempt of a indicial officer in the discharge of his duties. See New Crim. Law, II, §§ 264-267; Dir. & F., § 634. See also Rex v. Revel, 1 Stra. 420; Ex parte Marlborough, 5 Q. B. 955; Rex v. Griffith, Vern. & S., 612; Rex v. Barbone, Trem. P. C. 73.

Songs in Street. For the form of indictment for libel by singing songs in the street, see Rex v. Benfield, 2 Bur. 980.

82. Ante, § 123 et seq.

83. See the discussions in Bradlaugh v. Reg., 3 Q. B. D. 607. And see S. v. Burrell, 86 Ind. 313; Stener v. S., 59 Wis. 472.

84. Ante, § 794a.

85. Bell v. S., 1 Swan. (Tenn.) 42, 47, 48. This case contains a form of the indictment. And see

are jointly liable.[90] So it was held in Lord Mansfield's day, in a case of libel by a song.[91]

90. Vol. II, §§ 467-470. And see ante, §§ 59, 60; New Crim. Law, II, § 948 (2).

91. Rex v. Benfield, 2 Bur. 980, 983, 984.

For Liquor Nuisance, see Stat. Crimes; Liquor Selling, see Stat. Crimes; Living in Adultry, see Stat. Crimes; Living in Fornication, see Stat. Crimes.

CHAPTER CXXXIX

LORD'S DAY.

Consult—for the law of violations of the Lord : II, §§ 949a-970. For forms of the indictment an(& F., §§ 661-671. And for miscellaneous questions series of books.

§ 812. **Violations multiplied to Nuis**: tion of injurious acts often constitutes : ance, where no single one of them is a fence. So that assuming a single act o: not to be punishable at the common law, the instances may by multiplication beco: ance.[93] Chitty has for this form of t: necessary to be here inserted.[94]

§ 813. *The Indictment on the Statut*: **In Words our Statutes,**—while nearly differ considerably in the respective S| ment follows the particular statutory te: the special facts, after the rules expl: volume.[95]

92. New Crim. Law, I, § 499; Bishop Con. §§ 436-538.

93. New Crim. Law, II, § 965; Gunter v. S., 1 Lea, 129; Parker v. S., 16 Lea, 476.

94. 2 Chit. Crim. Law, 20; 3 Ib. 672. For a form, in connection with some expositions of the law, see Dir. & F., § 662 and notes.

95. Vol. II, § 593 et seq. For a general formula for the indictment, see Dir. & F., § 663. And for other varying forms, see Ib. §§ 664-671; Mosley v. S., 18 Tex. Ap. 311; C. v. De Voe, 159 Mass. 101; P. v. Hoym, 20 H: 8 Gray, 488; 407; Reg. v 926; C. v. C: Kline v. S., Messenger, S., 33 Ind. : 201; McCar: C. v. Wrigh v. S. (Tex. (695. As to s day perforn v. Penny, 42 Ex parte H P. 256. M(

§ 814. **What is One Offence.**—Under 29 Car. 2, c. 7, it was held that a man can commit, on the same day, but one offence of "exercising his ordinary calling on a Sunday."[96]

§ 815. 1. **Time**—is alleged as stated in the first volume.[97]

2. **Duplicity.**—On a statute forbidding one to "keep open" a shop, "*or*" to "traffic," etc., it is not double to aver, substituting "and" for "or," that he did both.[98]

§ 816. 1. **When to Negative**—exceptions and provisos in the statute was explained in the first volume.[99] Also—

2. **Words of Statute.**—We there saw how closely the indictment must follow the statutory words.[1] Thus,—

within statute forbidding theatre, playhouse, show, or any such place of amusement. Ex parte Bossner, 18 Idaho, 519, 110 P. 502; S. v. Penny, 42 Mont. 118, 111 P. 727; Yale v. Bingham, 110 N. Y. S. 12; Contra, S. v. Chamberlain, 112 Minn. 52, 127 N. W. 444; Edwards v. McClellan, 118 N. Y. S. 181; Williams Fox, etc. Co. v. McClellan, 114 N. Y. S. 594. Playing baseball on Sunday, Southern Tier Baseball Assn. of Elmira v. Day, 125 N. Y. S. 733, 69 Miss. 53; Ex parte Roquemore, 60 Tex. Cr. 282, 131 S. W. 1101, is not a misdemeanor, Yerkes v. Smith, 157 Mich. 557, 122 N. W. 223, 16 Det. Leg. N. 467; S. v. Prather, 79 Kan. 513, 100 P. 57; unless an admission fee is charged, P. v. Roach, 61 Misc. 42, 114 N. Y. S. 742. As to constitutionality of Sunday legislation see Moore v. Owen, 58 Misc. 332, 109 N. Y. S. 495; Stanfeal v. S., 78 Ohio St. 24, 84 N. E. 419; Ex parte Donnellan, 49 Wash. 460, 95 P. 1085.

96. Crepps v. Durden, Cowp. 640. And see Vol. I, § 402 (2), note. S. v. James, 81 S. C. 197, 62 S. E. 214, 18 L. R. A. (N. S.) 617. See Ellis v. S., 5 Ga. Ap. 615, 63 S E. 588.

97. Vol. I, § 399. And see C. v. Wright, 12 Allen, 187. As illustrative, Van Sickle v. P., 29 Mich. 61; S. v. Seabord Air Line Ry., 149 N. C. 508, 62 S. E. 1088.

98. S. v. Meyer, 1 Speers, 305; S. v. Helgen, 1 Speers, 310. And see McCarthy v. S., 56 Ind. 203; C. v. Wright, 12 Allen, 187; Henry v. S., 113 Ind. 304, 15 N. E. 593; Vol. I, § 436.

99. Vol. II, §§ 631-642, and particularly, § 636; S. v. Barker, 18 Vt. 195; Brittin v. S., 5 Eng. 299; S. v. Sutton, 24 Mo. 377; S. v. Gurney, 37 Me. 149; S. v. Shiflett, 20 Mo. 415, 64 Am. D. 190; S. v. Stone, 15 Mo. 513; C. v. Trickey, 13 Allen, 559; Russell v. S., 50 Ind. 174; C. v. Crowther, 117 Mass. 116; Billigheimer v. S., 32 Ohio St. 435; Jensen v. S., 60 Wis. 577, 19 N. W. 374.

1. Vol. II, §§ 608-630.

CHAPTER CXL.

MALFEASANCE AND NON-FEASANCE IN OFFICE.

Consult—for the law of the offenses included in this title, New Crim. Law, II, §§ 971-982. For the forms of the indictment, with related questions, Dir. & F., §§ 680-692, 919. For miscellaneous questions see the indexes to this series of books.

§ 819. 1. **A Group of Kindred Offenses,**—not strictly one offence, constitutes the subject of this chapter. And they are akin to several others, treated of in other connections.

2. **How Chapter divided.**—We shall consider, I. The Refusal to accept Office; II. Corrupt Acts and Neglects in Office.

I. *The Refusal to accept Office.*[12]

§ 820. **The Indictment**—for this offence set out, with time and place, the defendant's qualifications for the office, and his election or appointment thereto. It then avers that from the day aforesaid "to the day of the taking of this inquisition," at, etc., the defendant "wilfully, obstinately, and contemptuously entirely hath refused to take upon himself and to execute the said office."[13]

§ 821. **Further of the Form.**—Plainly, in principle, nothing short of this will constitute the *prima facie* case which every indictment, for whatever offense, must disclose. And

12. See, as to this, New Crim. Law, I, §§ 246 (1), 458.

13. Rex v. Bettesworth, Trem. P. C. 221; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 669, 670; Dir. & F., § 919. For a special plea by the defendant, who refused the office, Ib., § 1046, note.

§ 823. **Official Character,**—it is believed there is no denial, worthy of notice, of the sufficiency of the allegation of it just given.[19] To say that the defendant was duly elected to the office by the qualified electors of, etc., and took upon himself that trust, has been adjudged adequate;[20] but this implies nothing against the still briefer method of averment.

§ 824. **The Proof of the Official Character**—was, in an old case before a single judge, required to be by showing a due appointment to the office.[21] If this were indispensable, a mere officer *de facto* could not be convicted of offences of this class, as by nearly or quite universal doctrine he can be.[22] Besides, by at least the modern law of evidence, the defendant's acting in the office under claim of right creates the presumption that he has a valid title thereto.[23] So that the prosecuting officer may prove the defendant's official character either in this way, or by an elec-

Grat. 915; Hiss v. S., 24 Md. 556, 560; P. v. Weston, 4 Par. Cr. 226; Reg. v. Dale, Dears. 37, 6 Cox C. C. 93, 14 Eng. L. & Eq. 552; Rex v. Cope, 6 A. & E. 226, 7 Car. & P. 720; Rex v. Cross, Trem. P. C. 236; Rex v. Deeds, Trem. P. C. 233. And see Russell v. S., 57 Ga. 420; P. v. Castleton, 44 How. Pr. 238; S. v. Ferriss, 3 Lea, 700; S. v. Wedge, 24 Minn. 150; McCullough v. S., 63 Ala. 75; P. v. Meakim, 133 N. Y. 214; Hatch v. S., 10 Tex. Ap. 515.

19. Places cited to the last section, S. v. Harsh, 6 Blackf. 346; S. v. Odell, 8 Blackf. 396.

20. Edge v. C., 7 Pa. 75. And see Shanks v. S., 51 Miss. 464; S. v. McElroy, 3 Heisk. 69.

21. Rex v. Arnold, 1 Stra. 101. The report of this case is brief. Perhaps the ruling was not as my text states; but was that when proof by actual appointment is attempted, if the law requires it to be under seal, parol evidence will not be received. In this view, the decision was unquestionably correct.

22. New Crim. Law, I, § 464; S. v. Cansler, 75 N. C. 442; Long v. S., 76 N. C. 254; S. v. Stone, 40 Iowa, 547; Byrne v. S., 50 Miss. 688; Polk v. Coffin, 9 Cal. 56; Rex v. Hollond, 5 T. R. 607; S. v. Goss, 69 Me. 22.

23. Vol. II, § 1130; 1 Greenl. Ev., § 83, 92; Long v. S., supra; S. v. Stone, supra; S. v. Manley, 1 Tenn. 428; S. v. Stroope, 20 Ark. 202. And see, on this subject, Brush v. Cook, Brayt. 89; Gilmore v. Holt, 4 Pick. 258; U. S. v. Sears, 1 Gallis. 215; U. S. v. Bachelder, 2 Gallis. 15; S. v. Tool, 4 Ohio St. 553; S. v. Jacobs, 17 Ohio, 143; Billy v. S., 2 Nott & McC. 356; Jeter v. S., 1 McCord, 233; S. v. Lylles, 1 McCord, 228; Allen v. McNeel, 1 Mill, 459.

tion or appointment and swearing in, as ma convenient.

§ 825. 1. **On a Statute,**—the indictment entire statutory terms, and in some cases go according to the rules laid down in the first v statutes are numerous and diverse; so that a r to some cases will suffice under this head.[25]

2. **The Exceptions and Provisos**—must, v eral rules require, be duly negatived.[26] Also-

§ 826. **Sufficiently in Detail**—must be the satisfy the ordinary rules for indictments;[27] criminal quality of the defendant's act, and notice of the particular accusation.[28] Som are,—

§ 827. **For Neglect to Repair a Way,**—t against the supervisor need not, in Indiana, had the means to keep it in repair, this bei the defence. In the description of the wa need not be stated. It is enough to aver that was supervisor of, etc., in, etc., and that he wi the part of the road running from S., in said direction of G., in said county, situate in said to be obstructed, etc.[29]

24. Vol. II, §§ 608-630.

25. S. v. Hall, 5 S. C. 120; S. v. Stiles, 40 Iowa, 148; Mahar v. S., 28 Ark. 207; S. v. Kopper, 65 Mo. 478; Old v. C., 18 Grat. 915; S. v. Northfield, 13 Vt. 565; S. v. Record, 56 Ind. 107; Addison v. S., 41 Tex. 462; Edwards v. S., 2 Tex. Ap. 525; Douglas v. Reg., 13 Q. B. 74; S. v. Hein, 50 Mo. 362; S. v. Pinger, 57 Mo. 243; Doyle v. S., 49 Ala. 28; Snowden v. S., 17 Fla. 386; Turner v. Muskegon Cir. Judge, 95 Mich. 1; White v. S., 44 Ala. 409; P. v. Ward, 85 Cal. 585; Moose v. S., 49 Ark. 499, 5 S. W. 885; S. v. Foy, 98 N. C. 744, 3 S. E. 524; S. v. Miller, 100 N. C. 543 v. Kite, 81 Mo 9 38 Ark. 519; P. v 113.

26. S. v. Startu

27. Vol. II, § 5

28. And see P. 277; S. v. Bailey, S. v. Leigh, 3 De v. Buxton, 2 Sw Edwards v. S., 2 T Castleton, 44 Hov kins v. S., 54 Ga.

29. S. v. Hars And see S. v. Mill 5 S. E. 923; S. v 489.

§ 828. 1. **For a False Return,**—the indictment against a sheriff must show wherein it was false.[30] So,—

2. **For Non-feasance as to an Estray,**—it is in Indiana not sufficient, in averring the omission of the statutory duty, simply to say that the defendant "has continued to fail, neglect, and refuse to comply with any of the provisions of the statute," etc. The charge must specify the acts which he failed to perform.[31] Again,—

3. **Against an Overseer of the Poor,**—for cruel treatment of paupers, the indictment must set out their names, or aver that they are unknown.[32]

§ 829. **Non-delivery to Successor.**—A statute required one vacating the office of justice of the peace to deliver his books and papers to his successor, if "chosen and qualified at the time;" but if no successor was then chosen and qualified, the delivery of them was to be to a specified officer, "to be kept by him until a successor be chosen and qualified, and then delivered over to him on request." Thereupon an indictment was held inadequate which set out the lapse of a period of time between the close of the official term and the qualification of the successor, but did not charge a demand for the books and papers and their non-delivery.[33]

§ 830. 1. **A Violation of Duty**—must be made palpable by the averment.[34] Thus,—

2. **Non-payment.**—Where the law requires a constable, on collecting money, to pay it either to the magistrate or the party, a charge merely that he did not pay it to the party is inadequate.[35]

§ 831. **From whom Received.**—It suffices to aver that the defendant did not duly pay over money received, not saying from whom, on account of fines for the use of common schools.[36]

30 Tibbals v. S., 5 Wis. 596.
31. Dixon v. S., 4 Blackf. 312.
32. S. v. Hawkins, 77 N. C. 494.
33. S. v. Jones, 10 Humph. 41.
34. S. v. Shields, 8 Blackf. 151.
35. S. v. Longley, 10 Ind. 482.
36. Alexander v. S., 9 Ind. 337; S. v. McCormack, 2 Ind. 305.

§ 832. I
must state
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intent.[44]

37. S. v.
38. Ante,
39. Rex v
623.
40. Mahar
41. S. v. I
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on points lik
S., 5 Blackf
Blackf. 396;
212; Stewart
v. Boyles, 7
42. New C
462; II, §§ 9
§ 822; S.
(Tenn.) 57.

§ 836. 1. **For the Jury**—is the question of malice.[45] A sufficient presumption of it may arise from a wrong act intentionally done.[46] But—

2. **A Mistake of Law,**—especially in a judicial officer, is inadequate proof of corruption.[47]

Miss. 434; Stubbs v. S., 53 Miss. 437.

45. S. v. Allen, 22 Mo. 318. And see S. v. Pugh, 101 N. C. 737.

46. P. v. Bogart, 3 Par. Cr. 143; S. v. Heaton, 77 N. C. 505.

47. New Crim. Law, II, §§ 976, 977; S. v. Heaton, supra; S. v. Prescott, 31 Ark. 39; S. v. Reeves, 15 Kan. 396. And see S. v. Leach, 60 Me. 58, 11 Am. R. 172; Bottomley v. U. S., 1 Story, 135; Reg. v. Rochester, 2 Jur. 64.

For Malicious Injuries to the Person, see Dir. & F., §§ 693-696, and the places there referred to.

CHAPTER CXLI.

MALICIOUS MISCHIEF.

Consult—for the law of this offense, New Crim. La and for the law and procedure under statutes, Stat. (For the indictment, with connected questions, Dir. & F see, for miscellaneous questions, the indexes to this ser

§ 837. 1. **Distributed among the Severa** this Criminal law Series is the subject of chief.[48]

2. **How divided.**—We shall in this chap The Indictment generally and at the Commo cially of the Indictment on Statutes; III. Th

I. *The Indictment generally and at the Co*

§ 838. **The Common law Indictment**—alle ant's malice, describes the property, states of it; and, with the particularly required in for whatever offence, sets out the special a stituted the mischief in the individual insta

48. New Crim. Law, II, § 983.

49. See, for forms, with many explanations and authorities, Dir. & F., §§ 697-732; also see 2 Chit. Crim. Law, 23; 2 Stark. Crim. Pl. (2d Ed.) 576 et seq.; P. v. Moody, 5 Par. Cr. 568; S. v. Briggs, 1 Aikens, 226; Burgess v. S., 44 Ala. 190, 192; S. v. Simpson, 2 Hawks, 460; S. v. Scott, 2 Dev. & Bat. 35; Sample v. S., 104 Ind. 289, 4 N. E. 40; S. v. Blakesle P. 170; S. v. Mc 10 N. E. 405; 1 Cal. 434, 9 P. 457; Houst. Crim. 281 1 Mass. 59; S. v. H. 549, 552; P. (N. Y.) 258, 260 2 Hawks (N. Car. Teischer, 1 Dall.

§ 839. **Not quite Uniform,**—as explained in "New Criminal Law" and "Satutory Crimes," are the views of our tribunals as to what are the essential elements of either the common law or the statutory malicious mischief.[50] Hence, in some particulars, what would be a good indictment in one State might not be in another.

§ 840. **The Value of the Property**—injured or destroyed, whether the indictment is at the common law or on a statute, should, within principles already seen,[51] be stated if it affects the punishment,[52] otherwise it need not be,[53]—the same rule applying here as in larceny.[54] So that it suffices to give only the collective value of several enumerated things; but this is not judicious, since it would be practically ill should the proofs fail to sustain the entire averment.[55]

§ 841. **The Injury inflicted**—should be set forth with such minuteness of description as, within rules stated in the first volume,[56] will identify the transaction and sufficiently inform the defendant of the nature and extent of the accusation.[57] And in this, there is no difference between indictments drawn on the common law and on the

50. See, for example, New Crim. Law, I, §§ 569, 570, 577; II, §§ 984, 985; Stat. Crimes, §§ 433-436.

51. Vol. II, §§ 488b (2), 540, 541, 567; ante, § 713.

52. S. v. Shadley, 16 Ind. 230; Nicholson v. S., 3 Tex. Ap. 31; S. v. Heath, 41 Tex. 426; Reg. v. Thoman, 12 Cox C. C. 54; S. v. Garner, 8 Port. 447; Beaufler v. S., 37 Tex Cr. 50, 38 S. W. 608; S. v. McKee, 109 Ind. 497, 10 N. E. 405.

53. S. v. Simpson, 2 Hawks, 460; Caldwell v. S., 49 Ala. 34; S. v. Garner, 8 Port. 447; C. v. Soule, 2 Met. 21. And see S. v. Aydelott, 7 Blackf. 157; S. v. Blackwell, 3 Ind. 529; Maines v. S., 20 Tex. 38; Nutt v. S., 19 Tex. 340; Funderburk v. S., 75 Miss. 20, 21 So. 658; S. v. Culbreath, 71 Ark. 80, 71 S. W. 254; Stanton v. S., 45 Tex. Cr. 168, 74 S. W. 771.

54. Ante, §§ 713-716.

55. C. v. Falvey, 108 Mass. 304, 307.

56. Vol. II, §§ 509, 519, 520, 526, 530, 566.

57. S. v. Jackson, 7 Ind. 270; Hayworth v. S., 14 Ind. 590; S. v. Merrill, 3 Blackf. 346; S. v. Langford, 3 Hawks, 381; S. v. Aydelott, 7 Blackf. 157; Hotchkish v. Tuttle, 1 Root, 438; S. v. Deorssett, 19 Mo. 383; Read v. S., 1 Ind. 511; Shell v. S., 6 Humph. 283; P. v. Boren, 139 Cal. 210, 72 P. 899; S. v. Costello, 62 Conn. 128, 25 A. 477; Todd v. S., 39 Tex. Cr. 232, 45 S. W. 596.

statutes.[58] Illustrations of the all
trine appear in "Statutory Crime

§ 842. The Malice,—which is ar
should be alleged. In general, it i
property, but the owner.[60] Commo
pleader employs for this purpose t
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adverbs of the like sort. And so
in pointing the malice to the owner.
may be required to cover the term
lieved that no one form is exclusiv

§ 843. Ownership,—as in larcen
laid, whether the indictment is o
statute;[65] and it should be in the s
cases so hold.[66] But under special
tory modifications of common law
judications permit, perhaps justl
omitted.[67]

58. Vol. II, §§ 610, 611.

59. Stat. Crimes, §§ 446-449; Brazleton v. S., 66 Ala. 96; S. v. Greenlees, 41 Ark. 353; Dean v. S., 37 Ark. 57; Brown v. S., 76 Ind. 85.

60. New Crim. Law, I, § 595; and Places cited ante, § 839; Stat. Crimes, §§ 433-437; S. v. Hill, 79 N. C. 656; S. v. Lightfoot, 107 Iowa, 344, 78 N. W. 41; S. v. Click, 115 Tenn. 283, 90 S. W. 855.

61. See the cases cited ante, § 838.

62. S. v. Tweedy, 115 N. C. 704, 20 S. E. 183; P. v. O'Brien, 60 Mich. 8; C. v. Turner, 8 Bush, 1; S. v. Maddox, 85 Ind. 585.

63. S. v. Jackson, 11 Ire. 329; S. v. Simpson, 2 Hawks, 460; S. v. Scott, 2 Dev. & Bat. 35; Boyd v. S., 2 Humph. 39; S. v. Hambleton, 22 Mo. 452.

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§ 844. Malicious Mischief and other Wrong combining. —There are offences consisting in part of malicious mischief and in part of other elements of wrong. Then the indictment, like the offence, consists of a blending of different things into one; and the emergencies of the particular case will be the pleader's guide. One illustration is where the mischief is committed by the discharge of guns to the terror of the people in a dwelling-house;[68] another, where the windows of an inhabited building are broken in the night, with the like consequence;[69] another, where the house is thus fully or in part torn down.[70]

II. *Specially of the Indictment on Statutes.*

§ 845. 1. In "Statutory Crimes,"—statutory malicious mischief, with the procedure, is more particularly considered.[71]

2. **The Indictment,**—in these cases as in all others upon a statute, must mingle with the common law allegations those covering the particular language on which it is drawn, according to explanations in the first volume.[72] Thus,—

68. S. v. Langford, 3 Hawks, 381.

69. S. v. Batchelder, 5 N. H. 549.

70. S. v. Wilson, 3 Mo. 125.

71. Stat. Crimes, §§ 430-449.

72. Vol. II, §§ 593-642; S. v. Slocum, 8 Blackf. 315; Taylor v. S., 6 Humph. 285; S. v. Clifton, 24 Mo. 376; C. v. Butcher, 4 Grat. 544; C v. Dougherty, 6 Gray, 349; C. v. Bean, 11 Cush. 414; Glines v. Smith, 48 N. H. 259; Maskill v. S., 8 Blackf. 299; S. v. Pennington, 3 Head, 119; S. v. Pine, 30 Tex. 399; Rex v. Ashton, 2 B. & Ad. 750; Reg. v. Morris, 9 Car. & P. 89; S. v. Staton, 66 N. C. 640; S. v. Malloy, 5 Vroom, 410; S. v. Hussey, 60 Me. 410, 11 Am. R. 209; Birdg v. S., 31 Ind. 88; Rex v. Mogg, 4 Car. & P. 364; Rex v. Chalkey, Russ. & Ry., 258; S. v. Allen, 72 N. C. 114; S. v. Arnold, 39 Tex. 74; S. v. Simpson, 73 N. C. 269; C. v. Turner, 8 Bush, 1; S. v. Stalls, 37 Tex. 440; Allen v. Kirton, 2 W. Bl. 842; s. c. nom. Allen v. Kirton, 3 Wils. 318; S. v. Batson, 31 Mo. 343; Bates v. S., 31 Ind. 72; S. v. Hill, 79 N. C. 656; Rembert v. S., 56 Miss. 280; S. v. Parker, 81 N. C. 548; S. v. Boyd, 86 N. C. 634. Not necessary to prove damage to owner or express malice under a statute, S. v. Gilligan, 23 R. I. 400, 50 A. 844; see also S. v. Martin, 107 N. C. 904, 12 S. E. 194; P. v. Sheldon, 68 Cal. 434, 9 P. 457.

2. **Malice**—may be inferred from acts of mischief wilfully done.[79] The inference is not inevitable; as, it will not arise where the defendant proceeded on a license from one mistakenly believed to represent the owner.[80] And where, as commonly, the intent to injure the owner is an element in the offence, the evidence should point the malice toward him; it is not enough simply to show a mere unlawful act of injury.[81] But—

3. **Absence of License.**—That the defendant did not act under license from the owner need not be shown against him.[82] Yet the statute may be in terms to render the absence of a license a part of the government's *prima facie* case,[83]—a sort of question on which the authorities are not quite uniform.

4. **Other Instances**—of the like offending are sometimes relevant to the question of intent; as, on an indictment for malicious shooting, where it was uncertain whether a prov-

79. Rex v. Crutchley, 5 Car. & P. 133; Hobson v. S., 44 Ala. 380, 381; Johnson v. S., 61 Ala. 9, 11; Pippen v. S., 77 Ala. 81, 82; S. v. McAllister, 7 Pen. (Del.) 301, 76 A. 226; Harris v. S., 73 Ga. 41, 43; Lossen v. S., 62 Ind. 437, 440; Hughes v. S., 103 Ind. 344, 347, 2 N. E. 956; S. v. Enslow, 10 Iowa, 115, 117; S. v. Flynn, 28 Iowa, 26, 27; S. v. McDermott, 36 Iowa, 107; Com. v. Walden, 3 Cush. (Mass.) 558, 561; Duncan v. S., 49 Miss. 331, 339; Thompson v. S., 51 Miss. 353, 356; S. v. Brigman, 94 N. Car. 888, 889; S. v. Minor, 17 N. D. 454, 117 N. W. 528; Brown v. S., 26 Ohio St. 176, 183; S. v. Gilligan, 23 R. I. 400, 50 A. 844; S. v. Tarlton, 22 S. D. 495, 118 N. W. 706; Goforth v. S., 8 Humph. (Tenn.) 37, 39; Shirley v. S. (Tex. 1893), 22 S. W. 42; Brady v. S. (Tex. Cr. 1894), 26 S. W. 621; Woodward v. S., 33 Tex. Cr. 554, 28 S. W. 204; North Carolina v. Naderford, 35 Fed. 282, 287. Or from threat to do the acts of mischief, S. v. Murphy, 86 S. Car. 268, 68 S. E. 570. Malice is always for the jury. McClurg v. S., 2 Ga. Ap. 624, 58 S. E. 1064; S. v. Patton, 76 Kan. 665, 92 P. 588.

80. S. v. Underwood, 37 Mo. 225.

Res Gestae. The defendant's declarations after committing the act, may in some circumstances be admissible in his favor on the question of malice. S. v. Graham, 46 Mo. 490.

81. S. v. Underwood, supra; Lossen v. S., 62 Ind. 437; S. v. Cubberly (Del. 1911), 80 A. 1003; Knudson v. S., 56 Tex. Cr. Ap. 513, 120 S. W. 878.

82. S. v. Whittier, 21 Me. 341, 38 Am. D. 272; Welsh v. S., 11 Tex. 368.

83. Rex v. Hazy, 2 Car. & P. 458.

CHAPTER CXLII.

MAYHEM AND STATUTORY MAIMS.

Consult—for the law of this offense, New Crim. Law, II, §§ 1001-1008. For the forms of indictment, etc., Dir. & F., §§ 741-748. And see, for incidental questions, the indexes to this series of books. See also MALICIOUS INJURIES TO THE PERSON, Dir. & F., §§ 693-696.

§ 850 a. How Chapter divided.—We shall consider, I. The Common law Proceeding; II. The Proceeding upon Statutes.

I. *The Common law Proceeding.*

§ 851. Indictment.—Prior to any English statute of mayhem, there was pretty plainly a well defined felony of mayhem, distinguishable from some misdemeanors known by the like name.[92] Of course, there were forms of indictment for it. But the statutes began to appear as far back as the reign of Henry IV.; and in every case of mayhem within the terms of a statute, the indictment has been upon it. Possibly some of the old common law precedents may be found in our ancient books, but the author does not remember to have met with such.[93] And should he here suggest a form, it would be without authority, nor probably

92. New Crim. Law, II, §§ 1001, 1008.

93. Moreover, I judge that the early prosecutions for mayhem were seldom by indictment; appeal being, as Reeves tells us, "the usual mode." 2 Reeves Hist. Eng. Law, 33-35. In this proceeding, the appellor was generally excused from fighting by reason of the disabling wounds of which he complained, so that the trial was commonly by jury. Ib. 34. And the judgment was that the appellee "lose the like member as he has destroyed of the plaintiff; and if the plaint be made against a woman who has deprived a man of his members, she shall have judgment to lose a hand, being the member

would it ever be required in practice. Still, some knowledge of the common law indictment is desirable as a help to the procedure under our statutes. Thus,—

§ 852. **"Feloniously" and "Maim"**—were essential in allegation; the expression in Latin being *felonice mayhemavit.*[94] And—

§ 853. **Manner of Hurt, etc.**—As in murder, so in mayhem, the indictment was required to state, says East, "particularly in what manner the hurt was given, and the consequences following it; concluding that so the defendant feloniously maimed, etc., but the omission of the former is not helped by such general conclusion."[95] Moreover,—

§ 854. **As to Accessories.**—"Lord Hale considers," adds this author, "that there are no accessories before in mayhem, for that they are in the same degree as principles; and if the nature and punishment of the offence at common law, which was in effect only a trespass, be considered, it favors that opinion. Hawkins, however, says that there may be accessories before; but that the appellant has his election to proceed against them either as principals or accessories; and herewith agrees Staundford, to whom Lord Hale expressly refers. Yet I cannot help suspecting, upon a more accurate inspection of the authorities on which this last opinion is founded, that it is a mistake, proceeding perhaps upon the old notion which prevailed till after the time of Edw. III., that those who were present aiding and abetting, but did not commit the fact, were *accessories at the fact.* The authorities in support of it are all resolvable into 40 Assize 1, 9, and 41 Assize 16; and there it is said that the ancient law was that each should be appealed as

wherewith she committed the offense." This "eye-for-an eye" sort of punishment, adapted to a rude age, was not inflicted where the proceeding was by indictment. 1 Britton, by Nichols, 123. Of course, therefore, appeal must have been the favored suit. As to what appears to have been a somewhat different form of the appeal of mayham, wherein the consequences were less severe, see New Crim. Law, II, § 1001 (1), note.

94. 3 Inst. 118; 2 Hawk. P. C. c. 23, § 77.

95. 1 East P. C. 402, referring to 2 Hawk. P. C. c. 23, §§ 20, 75, 79: Ib. c. 25, § 57.

principal, but that now the appellant may elect to make all principals, or else only the one who struck principal, and the others accessories. But Brook, on one of these passages, says, *quod nota; and it seems that the ancient law was the best;* for *it is only trespass in effect.* And on the other he observes, *quod mirum; for in mayhem there are no accessories.* And in the time of Henry VI. it appears to have been considered that in mayhem all were principals; as well he who comforts and abets, as he who strikes the stroke. And certainly it is against the received opinion at this day that a person can be both accessory and principal in respect to the very same act."[96] But here again we are led back into the mists which envelop the old common law of this offence.[97] The consideration that there were misdemeanors called mayhem, distinct from the felony, may help dispel some of them.

II. *The Proceeding upon Statutes.*

§ 855. 1. **The Forms**—here required appear more fully in "Directions and Forms."[98]

2. **Under the Coventry Act,**[99] the charge was that on, etc., at, etc., the defendant, contriving, etc., the defendant, contriving, etc., in and upon one X, on purpose, and of his malice aforethought, and by lying in wait, unlawfully and feloniously did make an assault; proceeding to state the weapon, the holding of it, etc., the same as in murder; thereupon, in a case of slitting the nose, the averment states that with the weapon the defendant "the nose of the said X, on purpose, and of his malice aforethought, and by lying in wait, then and there unlawfully and feloniously did slit, with intention the said X, in so doing, in manner aforesaid, to maim and disfigure." The indictment concludes "and so the jurors," etc.,[1] as in murder.[2]

96. 1 East P. C. 400, 401.

97. New Crim. Law, II, § 1001 (1), note.

98. Dir. & F., §§ 741-748.

99. 22 & 23 Car. 2, c. 1; New Crim. Law, II, § 1003 (1).

1. Ante, §§ 502, 536, 541 (1), 548.

2. 3 Chit. Crim. Law, 787, 788. For other precedents, see Rex v. Woodburne, 16 How. St. Tr. 53; Rex v. Ringrose, Trem. P. C. 33;

§ 858. **For Cutting off the Ear,**—it was deemed necessary by the common law rules to state whether it was the "right" or "left" one. But under modifying statutes, this particularity was not required.[12]

§ 859. 1. **Assault and Battery**—are included in mayhem. So that on a charge of mayhem, there may be a conviction of assault or of battery, yet within limits already seen.[13] And—

2. **The Word "Assault,"**—not always indispensable in the indictment for assault,[14] may equally be supplied by other expressions in mayhem; whereupon there may be a conviction for the assault only, the same as in other cases.[15]

3. **Maiming in Arkansas**—was held to include an "aggravated assault and battery;" and on an indictment for the former, the conviction may be for the latter.[16]

4. One charged as Present—aiding and abetting a mayhem may be convicted of assault and battery, while the principal of the first degree is convicted of the mayhem.[17]

12. S. v. Green, 7 Ire. 39. And see Scott v. C., 6 S. & R. 224.

13. Vol. I, §§ 417-419; Cole v. S. (Tex. 1911), 138 S. W. 109.

14. Ante, §§ 57 (3), 58.

15. Benham v. S., 1 Iowa, 542.

16. Guest v. S., 19 Ark. 405.

17. S. v. Absence, 4 Port. 397. As to the Verdict,—S. v. Bloedow, 45 Wis. 279.

For Manslaughter, see Homicide; Meeting, Illegal, see Unlawful Assembly; also, Disorderly House; Mischief, see Malicious Mischief; Murder, see Homicide; Neglect, see Dir. & F., §§ 749-758; Noxious Trades, see Nuisance.

CHAPTER CXLIII.

NUISANCE.

Consult—for the law of nuisance, New Crim. Law, I, §§ 1071-1082. As to the indictment, etc., Dir. & F., §§ 773-835. For multitudes of incidental questions see the indexes to this series of books.

§ 860. 1. Already in this Volume—we have considered various nuisances under their titles; as, Barratry, Bawdy-House, Common Scold, Disorderly House, Eavesdropping, Exposure of Person, and Gaming-House. And further on, under the title Way, the procedure for the obstruction of ways will be explained.

2. **In "Statutory Crimes,"**—Open and Notorious Lewdness, Liquor Nuisances, and some others, more particularly statutory, are treated of, both as to the law and the procedure.

3. **In this Chapter,**—we shall call to mind some of the more general doctrines of our subject, then proceed with what is special to some particular nuisances not sufficiently explained in other connections: as to, I. The Indictment generally and at the Common Law; II. The Indictment specially upon the Statutes; III. Questions of Evidence and Practice; IV. Particular Nuisances not elsewhere considered.

I. *The Indictment Generally and at the Common Law.*

§ 861. 1. A General Formula—for the indictment is given in "Directions and Forms."[18]

18. Dir. & F., § 777.

2. **As to Particular Nuisances,**—we saw, while treating of them in the preceding chapters, what is the form of indictment for each.[19] The reader who compares the forms will discover that as the various nuisances differ in their elements, so differ also the terms by which those elements are described in allegation.[20] Hence,—

3. **His Practical Course.**—if he does not rely implicitly on precedents, will be to define to himself accurately the facts which in law constitute the nuisance he would set out, then aver them in accordance with the general principles governing indictments, and add the conclusion common for all nuisances. As to the—

§ 862. 1. **Concluding Part.**—Following the conclusion "against the peace," etc., required in all indictments unless dispensed with by statute,[21] it is common to add, in the indictment for nuisance, such words as "to the great damage and common nuisance [or simply to the common nuisance] of all the people there lawfully being and abiding." Which form is often even more expanded; as, in Archbold, "To the great damage and common nuisance of all the liege subjects of our said lady the queen, there inhabiting, being, and residing, and going, returning, and passing through the said streets and highways."[22] If we assume something of this to be required, still,—

2. **"To the Damage"**—is plainly unnecessary.[23]

19. Ante, §§ 98, 105 (2), 199, 273, 312, 351, 488.

20. Consult the places cited in the last note, and particularly the entire chapter in Dir. & F.; also post, §§ 874a-875, 877a, 878; and the forms for such nuisances as Explosive Substances kept in a warehouse, Reg. v. Lister, Dears. & B. 209, 210, note, 7 Cox C. C. 342, 344; Spreading Infection, Reg. v. Henson, Deers. 24, 18 Eng. L. & Eq. 107; Rex v. Vantandillo, 4 M. & S. 73. For an Offensive Necessary House, S. v. Purse, 4 McCord, 472. For an Offensive Trade, Horner v. S., 49 Md. 277. For Wooden Building in city, Stewart v. C., 10 Watts, 306. See 6 Went. Pl. 431. Act need not be continuous nor affect public, but only those in contact with it. S. v. Waymire, 52 Ore. 281, 97 Pac. 46.

21. Vol. II, §§ 648-651.

22. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 633, (19th Ed.) 956. Chitty puts this form even more verbosely. 3 Chit. Crim. Law, 607a.

23. Vol. II, § 647; ante, 57 (2); Dir. & F., § 48.

3. **"All"—"Divers."**—Since a nuisance, to be a public one in distinction from a private, must not be limited to the injury of one or a few persons, the allegation, if employed, should be "to the common nuisance of *all*," etc.; not *divers*, etc.[24] But—

§ 863. The Modern Books.—though perhaps not the ancient ones, leave it uncertain whether this conclusion "to the common nuisance," etc., is, in any form, necessary. If, as in barratry and common scold, the main charge is simply in the general terms permissible only in those offences[25] there is ground for saying that the conclusion "to the common nuisance of all the people" may add some strength to the very slender allegation of the main fact. Hence, in these cases, it would seem to be necessary. But the authorities to this are not quite conclusive.[26] On the other hand, passing from the exceptional class,—

§ 864. Generally as to Conclusion.—This conclusion, "to the common nuisance," can in no form of it supply any defect in the main allegations;[27] so that, if the facts set down in them do not amount to an indictable nuisance, the added averment that they were to the common nuisance of all the citizens of the State—a mere superfluous enunciation of a mistaken conclusion of law[28]—will not make them appear such to the court, on whom, not the grand jury, rests the decision of legal questions.[29] Or if the facts directly averred show *prima facie* guilt in the defendant, the further averment of the correct conclusion of law that they constitute an indictable nuisance will not teach anything to the court,

24. New Crim. Law, I, § 243 (2), 1078; Anonymous, 12 Mod. 504; C. v. Faris, 5 Rand. 691; Hayward's Case, Cro. Eliz. 148. See S. v. Houck, 73 Ind. 37; C. v. Sweeney, 131 Mass. 579. As to who may prosecute, Jones v. Chanute, 63 Kan. 243, 65 P. 243.

25. Post, § 865.

26. Compare ante, § 200 (2); 1 Hawk. P. C. Curw. Ed. 693, § 5; 2 Ib. c. 25, § 59; Rex v. Clayton, 2 Keb. 409, 410; Rex v. Cooper, 2 Stra. 1246; S. v. Middlesex & S. Traction Co., 67 N. J. L. 14, 509, 354; West v. S., 71 Ark. 144, 148, 71 S. W. 483.

27. And see Palmer, §§ 368, 374.

28. Vol. I, § 329; Vol. II, §§ 508, 514, 515.

29. Morris and Essex Rld. v. S., 7 Vroom, 553.

or make plain what requires no explanation. Therefore, in principle, this conclusion is not necessary.[30] But the authorities are divided.[31] In States wherein the question

30. In the words of Gaston, J.: "If the facts charged must, from their very nature, have created a nuisance to the citizens in general, the words ad commune nocumentum, though always proper and safest to be inserted, may be omitted, for they neither describe the crime nor the facts which constitute it." S. v. Baldwin, 1 Dev. & Bat. 195, 197. Compare Acme Fertilizer Co. v. S., 34 Ind. Ap. 346, 351, 72 N. E. 237; S. v. Ohio Oil Co., 151 Ind. 21, 37, 47 L. R. A. 627.

31. And see ante, § 353 (3); New Crim. Law, I, §§ 243-245; Prat v. Stearn, Cro. Jac. 382; 1 Russ. Crimes (5th Eng. Ed.) 440; Train & Heard Prec. 57 and note; Thorowgood's Case, 1 Mod. 107; C. v. Faris, 5 Rand. 691; S. v. Schilling, 14 Iowa, 455; S. v. Stevens, 40 Me. 559; Anonymous, 1 Vent. 26; Reg. v. Holmes, Dears. 207, 3 Car. & K. 360, 6 Cox C. C. 216, 20 Eng. L. & Eq. 597. In Massachusetts, the judicial utterances and perhaps the decisions are contradictory, apparently without the slightest suspicion by the court that they are so. Thus, in 1850, one was charged with uttering in a public street loud noises, thereby drawing together "a number of persons to the great disturbance of divers citizens." This was held not to set forth an indictable wrong, but nothing was said about the conclusion. C. v. Smith, 6 Cush. 80. Next, in 1854, on an indictment for indecently exposing the person, the conclusion "to the common nuisance," etc., was held to be unnecessary; Dewey, J., observing that "the form of the present indictment," from which this conclusion was omitted, "in this respect is supported by the authority of 2 Chit. Crim. Law, 41, and Archb. Crim. Pl. (5th Am. Ed.) 655." C. v. Haynes, 2 Gray, 72, 73, 61 Am. D. 437. In the case which stands next in the same volume of reports, a complaint before a magistrate against one for being a common drunkard was held not to require this conclusion, "because" the offense was not a nuisance. But in apparent contradiction to the last cited case, Merrick, J. said: "It is undoubtedly indispensable that nuisances should be alleged in complaints and indictments to be to the great damage and common nuisance of all the citizens of the Commonwealth. 1 Chit. Crim. Law, 245, 246; C. v. Smith, 6 Cush. 80." C. v. Boon, 2 Gray, 74, 75. Next, in 1859, Metcalf, J., again reversing the doctrine, said. "It is not necessary, in an indictment alleging matters that constitute a common nuisance, to conclude ad commune nocumentum, although it is usual to do so. 1 Stark. Crim. Pl. (2d Ed.) 208; Archb. Crim. Pl. (5th Am. Ed.) 67; C. v. Haynes, 2 Gray, 72. See also Brady v. Reg., 4 Ir. Law, 21, 2 Jebb & Symes, 647." From analogy to which doctrine the court held that an indictment for obstructing public justice need not conclude "to the obstruction and hinderance of public justice." C. v.

has been distinctly settled by adjudication, of course the beaten track will be adhered to. In other States a considerate court will follow the plain doctrine of principle.

Reynolds, 14 Gray, 87, 91, 74 Am. D. 665. In 1869, this was once more reversed in what is perhaps only dictum; Chapman, C. J. observing,—"It was held in C. v. Smith, 6 Cush. 80, that it is necessary, in an indictment for a public nuisance by uttering loud cries and exclamations in a public street, to allege that it was to the great damage and common nuisance of all the citizens of the Commonwealth there inhabiting, being, and residing. A similar allegation is found in the forms of indictments for causing noisome smells or letting off fireworks in a public street, or for keeping a gaming house or a disorderly house, and for other nuisances of a similar character. In England, such an allegation has been made unnecessary by Stat. 14 & 15 Vict. c. 100, § 25. But the proof need not be as extensive as the allegation." C. v. Harris, 101 Mass. 29, 30. Finally, in 1873, we have a dictum which accords with the one which stands next before it. Said Colt, J.: "An indictment for a public nuisance by uttering loud cries and exclamations in a public street must allege that it was to the great damage and common nuisance of all the citizens of the commonwealth there being. This is the technical description, but the proof need not be as broad as the allegation." C. v. Oaks, 113 Mass. 8, 9. Now, what is the Massachusetts law on this question? I do not know what the court, in the next case, will deem it to be; but if I were to answer, I should say that C. v. Smith does not decide what in later cases the judges have assumed it did. Therefore I should throw out of the account that case, and all the dicta depending upon and referring to it. C. v. Haynes, distinctly and directly holds the conclusion to be unnecessary. That was the exact question in issue. C. v. Boon flatly contradicts this, but it is difficult to say that the contradiction is more than dictum. The later case of C. v. Reynolds directly sustains C. v. Haynes; and though this point is not the "very" one decided, indirectly it was involved in the "very" decision. What comes after, to overrule these two cases, I should reject as mere dictum; hence, should deem the Massachusetts doctrine not to require the conclusion under consideration. The question might arise whether the doctrine is not this or that according to the kind of nuisance. But I can discover no ground for such a distinction, either in reason, except as stated in the last section of my text, or in the utterances or actual decisions of this tribunal. An indictment for carrying on a lawful trade which may or may not be a nuisance, according to location, must conclude to the common nuisance of all persons there living, or there passing or repassing, or having the right to pass. Com. v. Megibben, 101 Ky. 195, 40 S. W. 694.

§ 865. 1. **The Acts constituting the Nuisance,**—except in nusanceis of barratry,[32] common scold,[33] common night-walker,[34] and possibly one or two others of the like sort, must be set out with the detail and fulness required in other offenses. They must both identify the transaction, and affirmatively show *prima facie* guilt.[35] Thus,—

2. **Special Circumstances,**—when they render a thing a nuisance which is not such in itself, must be alleged.[36] And—

3. **A Demoralizing Show**—must be set out by stating so much of the facts of its indecency, barbarity, or the like, as will enable the court to discern its indictable character.[37]

§ 866. 1. **Abatement.**—The indictment may be good or not, according as judgment for the abatement of the nuisance is or is not to be asked.[38] Thus,—

2. **Where Punishment only is sought,**—there is no need to aver that the nuisance is continuing.[39] But without this averment there can be no judgment of abatement, since the ground for it will not appear.[40] The form of this allega-

32. Ante, §§ 98, 100.

33. Ante, §§ 199, 200.

34. Post, § 874a.

35. See, as illustrative, besides other cases cited to this section, Stein v. S., 37 Ala. 123; Boyer v. S., 16 Ind. 451; Respublica v. Arnold, 3 Yeates, 417; Crane v. S., 3 Ind. 193; S. v. Hart, 34 Me. 36; S. v. Matthews, 42 Vt. 542; S. v. Hanley, 47 Vt. 290; Rex v. Watts, 2 Car. & P. 486; Rex v. Haddock, Andr. 137; S. v. Sturdivant, 21 Me. 9; C. v. Twitchell, 4 Cush. 74; Rex v. White, 1 Bur. 333; S. v. Frieberg, 49 Ohio St. 585; S. v. Doyle, 15 R. I. 527, 9 A. 900; Ehrlick v. Com., 31 Ky. L. 401, 102 S. W. 289; S. v. Waymire, 52 Ore. 281, 97 P. 46; West v. S., 71 Ark. 144, 71 S. W. 482; Lipschitz v. S., 33 Ind. Ap. 648, 72 N. E. 145; City of Paris v. Com., 29 Ky. L. 483, 93 S. W. 907; Com. v. Perry, 139 Mass. 198, 29 N. E. 656; Messerschmidt v. P., 46 Mich. 437, 9 N. W. 485.

36. Anonymous, Palmer, 368, 374; C. v. Webb, 6 Rand. 726.

37. Knowles v. S., 3 Day, 103.

38. New Crim. Law, I, § 1079; post, § 871. Averment necessary to obtain an order of abatement. Com. v. Megibben, 101 Ky. 195, 19 Ky. L. 291, 40 S. W. 494.

39. S. v. Hull, 21 Me. 84; S. v. Barnes, 20 R. I. 525, 40 A. 374; Chesapeake & Ohio R. Co. v. Com., 8 Ky. L. 534.

40. Vol. I, § 393 (2); Munson v. P., 5 Par. Cr. 16; Rex v. Stead, 8 T. R. 142; Taylor v. P., 6 Par. Cr. 347.

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volume.[41] It may be,
defendant erected, an
the nuisance.[42]

3. **Place.**—In prin
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Moreover, where the
highway, or a buildin
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41. Vol. I, § 393 et se
brook v. C., 1 Bush, 139.

42. Baugh v. S., 14 Ind.
see Ashbrook v. C., 1 Bush
Am. D. 616; Wroe v. S., 8

43. Ante, § 111; post, §

44. Ante, §§ 381, 382; S.
divant, 21 Me. 9.

45. Ante, §§ 19, 34, 123
351.

46. Ante, §§ 41, 103
135, 286a, 351, note, 488 (
Sneed, 16 Lea, 450; Dronel
S., 112 Ind. 105, 13 N. E. 2
Uvalde Asphalt Pav. Co.,
L. 512, 53 A. 299; Com. v
ben, 101 Ky. 195, 40 S. W
Ky. L. 291. Compare City
port v. Com., 108 Ky. 151
L. 1591.

47. Compare cases cite
places referred to in the l

§ 867. 1. **Duplicity**—must, in these cases as in others, be avoided.[49] Yet one nuisance may be constituted by various acts, and to allege all the acts in one count does not render it double.[50] For example, the keeping of swine in a pen near a public way, and the feeding of them there with offal, are but one nuisance, and both may be charged in one count.[51] But—

2. **To Erect and to Continue**—a nuisance are, either sometimes or always, distinct offenses; thereupon a count which joins them is double.[52] But we may doubt the universality of this doctrine as applied to all nuisances; for example, to those in their natures continuing.[53]

II. *The Indictment specially upon the Statutes.*

§ 868. 1. **The Foregoing Sections**—have conducted us well into this sub-title. And—

2. **In the first Volume**—we saw on what principles are constructed all indictments upon statutes; including, therefore, the present ones.[54] Thus,—

be always so. Ante, §§ 41, 111, 135 (1). The Massachusetts cases illustrate this. In C. v. Wellington, 7 Allen, 299, the indictment for the nuisance of disfiguring a public burying-ground, having described the place by metes and bounds, the court adjudged that proof correspondingly strict with the allegation was required to avoid a variance. Then, in C. v. Heffron, supra, where the town was alleged, but not in a form descriptive, this case was cited by the court to the very different proposition that a statutory liquor-nuisance is local and the place must be proved to have been in the town averred. Indictment need not describe premises to subject them to a lien. Jasper Co. v. Sparham, 125 Iowa, 464, 101 N. W. 134.

49. Chute v. S., 19 Minn. 271; Knopf v. S., 84 Ind. 316.

50. Ante, § 106 (2); S. v. Matthews, 42 Vt. 542; C. v. Mills, 6 Bush, 396; C. v. Twitchell, 4 Cush. 74; S. v. Hanley, 47 Vt. 290; S. v. Frieberg, 49 Ohio St. 585. And see C. v. Colby, 128 Mass. 91.

51. S. v. Payson, 37 Me. 361. And see Rex v. Pappineau, 1 Stra. 686; Com. v. Louisville & N. R. Co., 27 Ky. L. R. 592, 86 S. W. 517.

52. Burke v. P., 23 Ill. Ap. 36; Hoadley v. P., 23 Ill. Ap. 39.

53. Vol. I, § 393 (2); Dir. & F., §§ 788, 1013-1015.

54. Vol. II, § 593 et seq.

it shall not be renewed.[66] In proper circumstances, court will continue the case for sentence, to give oppor- nity for such abatement.[67] Hence,—

§ 871. 1. A Judgment for Abatement—is seldom calle for, since it is almost necessarily for the interests of the defendant to remove the nuisance voluntarily. Therefore the practice in judicial abatements is not in all particulars well defined. But, by all the authorities, the defendant may be required, as a part of his sentence, to abate the nuisance;[68] nor is this punishment forbidden by our constitutions as being cruel or unusual.[69] On principle, if he refuses obedience to this command, he may be compelled by process as for contempt;[70] or, what is in effect the same thing, the judgment may provide that he stand committed till the nuisance is removed, in analogy to the practice where a fine is imposed.[71] Beyond which, the court may, should necessity require,—perhaps must, if so moved by the prosecuting officer,—award the writ *de nocumento amovendo*.[72] It is addressed to the proper officer, recites the record of the cause, sets out what is to be abated, and commands that "you do without delay remove, or cause to be removed," etc., the nuisance.[73] This also is believed to be the true doctrine of our courts, which, if it exists, must be followed,[74] where a statute has not made conflicting reg-

66. Rex v. White, 1 Burr. 333, 338. And "the court never admits him to a small fine till the nuisance is removed." Dalt Just. c. 66.

67. Rex v. ——, 2 Show. 60.

68. New Crim. Law, I, § 1079 (1); Delaware, etc. Canal v. C., 60 Pa. 367, 100 Am. D. 570; Rex v Stead, 8 T. R. 142; Rex v. West Riding of Yorkshire, 7 T. R. 467; Rex v. Incledon, 13 East, 164; Rex v. Pappineau, 1 Stra. 686; P. v. Branchport and Penn Yan Plank Road, 5 Par. Cr. 604, 620; Respass v. Com., 31 Ky. L. 371, 102 S. W. 331.

69. McLaughlin v. S., 45 Ind. 338.

70. New Crim. Law, II, § 256; Bac. Abr. Nuisance, D.

71. Vol. II, § 1301; Taggart v. C., 21 Pa. 527.

72. Archb. New Crim. Pro. 205.

73. 2 Gude Crown Pract. 556, 557. And see further, as to these several questions, Rex v. Wilcox, 2 Salk. 458; Solan v. Rebman, 66 Iowa, 81.

74. Smith v. S., 22 Ohio St. 539; Matthews v. S., 25 Ohio St. 536.

ulations. In Alabama, a judgment "that the nuisance be abated forthwith, at the costs of the defendant, and the sheriff is charged with the execution of this order," was deemed informal, as being a command to the sheriff, not the party;[75] nor does this accord with the practice above stated.

2. **The Judgment for Abatement**—should not be too broad,[76] but should require the removal only of "so much of the thing as makes it a nuisance."[77] Or, if the illegality is in the wrongful use of a building, the abatement consists of stopping such use.[78] In Maine, where by statute the court is simply permitted, not required, to order the abatement, it has declined acting if the interests of strangers may thereby be "improperly affected."[79] Still, that a public nuisance is on a stranger's land affords no just reason for leaving it unabated.[80]

§ 872. **To compel Abatement,**—it was formerly the rule, and something like it may still be in practice, not to quash a defective indictment for a continuing nuisance, unless the defendant applying will abate it.[81] In reason, this can be only where the existence of the nuisance is palpable or conceded.

§ 873. **Particulars.**—Some of these cases of nuisance are proper for the discretionary note or bill of particulars.[82]

75. Campbell v. S., 16 Ala. 144.

76. New Crim. Law, I, §§ 828, 1081 (as to private abatement); S. v. Moffett, 1 Greene (Iowa), 247; Morrison v. Marquardt, 24 Iowa, 35, 92 Am. D. 444; Smart v. C., 27 Grat. 950.

77. Rex v. Pappineau, 1 Stra. 686, 688. And see Baten's Case, 9 Co. 53b; Shepard v. P., 40 Mich. 487; Craig v. Werthmueller, 78 Iowa, 598.

78. 1 Russ. Crimes (5th Eng. Ed). 442; Brightman v. Bristol, 65 Me. 426, 20 Am. R. 711; Earp v. Lee, 71 Ill. 193. See Welch v. Stowell, 2 Doug. Mich. 332; Ely v. Niagara, 36 N. Y. 297; Barclay v. C., 25 Pa. 503, 64 Am. D. 715; S. v. Kaster, 35 Iowa, 221.

79. S. v. Haines, 30 Me. 65.

80. Delaware, etc. Canal v. C., 60 Pa. 367.

81. Leyton's Case, Cro. Car. 583. And see Anonymous, 11 Mod. 305; Reg. v. Wigg, 2 Ld. Raym. 1163. And, as illustrative, see Rex v. Green, 1 Keny, 379.

82. Vol. II, § 643 et seq.; S. v. Hill, 13 R. I. 314.

The court may order it without affi

§ 874. **Juror—(Mill-dam).**—One dams are in general, in the part o controversy arose, nuisances, and t with are such, is not a competent ju ing up a mill-dam; though he is no in question, nor has he formed or e garding it.[84]

IV. *Particular Nuisances not*

§ 874 a. **For Common Night-walk** on a question not perhaps absolutel indictment to allege that on, etc., "was a common night-walker," e ramble in the streets," etc.[86]

§ 874 b.—**Noises.**—The nuisance noises in a public place,[87] has bee set out in the averment that on, etc. street of a town, the defendant di tions and outcries, and did then and a number of persons," etc.[88] And i court to refuse to permit the defe whether he saw any indication that were disturbed or annoyed by the was immaterial.[89]

§ 875. **For carrying on an Offens** lic discomfort,[90] the indictment will the nature of the trade, the sort of a

83. Rex v. Curwood, 5 Nev. & M. 369, 1 Har. & W. 310.

84. Crippen v. P., 8 Mich. 117.

85. New Crim. Law, § 501 (4); Dir. & F., § 1007.

86. S. v. Dowers, 45 N. H. 543. Compare with Dir. & F. ut sup.

87. New Crim. Law, I, § 531 (2).

88. C. v. Harris, 101 Mass. 29.

And s S. v. v. Oa other 833.

89.

90. et seq.

ial circumstances. Besides the proper introductory and concluding averments, it simply sets forth the facts.[91]

§ 876. **Other Instances**—of offensive trade will rarely, if ever, be pertinent in aid of the proofs of the one on trial.[92]

§ 877. **Offensive Acts not within the Allegations**—are undoubtedly admissible in proof when of the *res gestae.*[93] But the verdict cannot rest upon them. Therefore when the charge was that by boiling and trying out putrid meats, etc., offensive odors were emitted from a building, the jury were not permitted to take into their account odors from outside the building, though proceeding indirectly from the works within.[94]

§ 877 a. **Rendering the Air unwholesome,**—as in this case, is one of the forms of the nuisance of offensive trades. But the air may be corrupted by other means, and the indictment therefor will be drawn on the same plan as above.[95]

91. See, for precedents, Dir. & F., §§ 827-831; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 633, 634, where also are references to the following: "for using a shop in a public market as a slaughter-house, C. C. C. 301, and see 4 Went. 224; for erecting a manufactory for hartshorn, C. C. C. 311; for erecting a privy near the highway, 4 Went. 225; for placing putrid carrion near the highway, 4 Went. 213; for keeping hogs near a public street and feeding them with offal, C. C. C. 305, and see Reg v. Wigg, 2 Ld. Raym. 1163; for keeping a fierce and unruly bull in a field through which there was a footway, C. C. C. 310; for keeping a ferocious dog unmuzzled, C. C. C. 311; for baiting a bull in the king's highway, 4 Went. 213." For further precedents, see C. v. Rumford Chemical Works, 16 Gray, 231; S. v. Wilson, 43 N. H. 415, 82 Am. D. 163; Reg. v. Mutters, Leigh & C. 491, 10 Cox C. C. 6; Rex v. Brooks, Trem. P. C. 195; C. v. Brown, 13 Met. 365; Rex v. Cole, Trem. P. C. 198; Taylor v. S., 35 Wis. 298. See also S. v. Hart, 34 Me. 36. Polluting stream with oil and refuge. Indian Refining Co. v. Com. (Ky. 1909), 117 S. W. 274. See Board of Health of Pompton Lakes v. E. I. DuPont de Nemours Powder Co. (N. J. 1911), 80 A. 998.

92. Reg. v. Fairie, 8 Ellis & V., 486.

93. Vol. II, §§ 1083, 1084, 1125.

94. C. v. Brown, 13 Met. 365, 368. Compare with Dennis v. S., 91 Ind. 291; Chisholm v. Doulton, 22 Q. B. D. 736, 16 Cox C. C. 675.

95. For corrupting the air, etc., by a Dam,—overflowing grounds, see Stephen v. C., 2 Leigh, 759; S. v. Close, 35 Iowa, 570; Munson v. P., 5 Par. Cr. 16; by a Piggery, —S. v. Payson, 37 Me. 361; S. v. Kaster, 35 Iowa, 221; by a "Nec-

§ 878. **Rendering Water unwholesome**—may be a nuisance. It is created in different ways, and the indictment and proofs will vary accordingly.[96] On the trial of a gas company for conveying refuse gas into a great public river, destroying the fish and making the water unfit to drink, "the question," said Denman, C. J., "will be whether there has been a noxious and deleterious ingredient conveyed into the river, whereby the water has been corrupted and rendered unfit for use; and if there has been, then whether, in the concluding words of the indictment, it was to the common nuisance of the king's subjects." The circumstance that by the diminution of fish many fishermen were thrown out of employment, was not deemed of itself sufficient ground to sustain the proceeding.[97]

essary-house,"—Rex v. Pedley, 1 A. & E. 822; Acme Fertilizer Co. 34 Ind. Ap. 346, 72 N. E. 1037.

96. S. v. Buckman, 8 N. H. 203, 29 Am. D. 646; Stein v. S., 37 Ala. 123; P. v. Townsend, 3 Hill, N. Y. 479.

97. Rex v. Medley, 6 Car. & P. 292, 299.

CHAPTER CXLIV.

OBSTRUCTING JUSTICE AND GOVERNMENT.

Consult—for the law of these offenses, New Crim. Law, I, §§ 450-480; II, §§ 884-889, 1009-1013. For the precedents etc., Dir. & F., §§ 836-854. And for various incidental questions, see the indexes to this series of books.

§ 879. 1. **Various Offenses**—named and unnamed, at common law and statutory, are within the subject of this chapter. But—

2. **Elsewhere in this Volume**—we have considered Barratry,[98] Bribery,[99] Champerty and Maintenance,[1] Counterfeiting the Coin,[2] and Embracery;[3] and further on, Perjury, Prison Breach, and the like, will come under review.

§ 880. **This Chapter**—treats of, I. Assaulting or Resisting an Officer in his Duties; II. Other Obstructions.

I. *Assaulting or Resisting an Officer in his Duties.*

§ 881. 1. **For the Indictment,**—the reader should carefully consult the chapter in "Directions and Forms."[4]

2. **Assaulting an Officer**—is otherwise termed an aggravated assault. The principles which govern the indictment for it have been already considered.[5] Thus, by the English 9 Geo. 4, c. 31, § 24 (re-enacted in 24 & 25 Vict. c. 100, § 37), it was made punishable to "assault and strike or

98. Ante, § 98 et seq.

99. Ante, § 126 et seq.

1. Ante, § 154 et seq. Complaint and warrant in fictitious name, S. v. King, 71 Kan. 287, 80 Pac. 606.

2. Ante, § 246 et seq.

3. Ante, § 344 et seq.

4. Dir. & F., §§ 836-854.

5. Ante, §§ 63-64. See Appling v. S., 95 Ark. 185, 128 S. W. 866; Gibson v. S., 118 Ga. 29, 44 S. E. 811.

wound any magistrate, officer, or other person whatsoev lawfully authorized, on account of the exercise of his du in or concerning the preservation of any vessel in distres or any vessel, goods, or affects wrecked, stranded, or cas on shore, or lying under water;" thereupon it was an approved form to say that on etc., at, etc., one B, "being a magistrate, was then and there engaged in the exercise of his duty as such magistrate, in and concerning the preservation of a certain vessel then and there wrecked, stranded, and cast on shore, the said B being then and there lawfully authorized thereunto; and that A," the defendant, "well knowing the premises, in and upon the said B then and there unlawfully did make an assault, and him the said B then and there unlawfully did strike and wound, on account of the exercise of the duty of him the said B in and concerning the preservation of the said vessel so wrecked, stranded, and cast on shore as aforesaid."[6]

§ 882. For otherwise Resisting—the officer, the indictment is drawn like this one, except that it sets out the other method in place of the assault.[7]

§ 883. 1. The Statutory Terms—must, as in the above form,[8] be carefully covered by the allegations. Our American statutes differ from the foregoing English one and from one another; therefore the pleader should keep within their particular terms, and cover the interpreted meanings after rules already explained.[9] And—

6. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 457, 19th Ed. 737. For other forms of the indictment for assault on an officer, see C. v. Tobin, 108 Mass. 426; C. v. Hastings, 9 Met. 259; Rex v. Brady, 2 Leach, 803; C. v. Kennard, 8 Pick. 133; S. v. Roberts, 26 Me. 263. And see C. v. McGathey, 11 Gray, 194; S. v. Gilbert, 21 Ind. 474; Rex v. Osmer, 5 East, 304, 1 Smith, 555.

7. See, for forms, Heath v. S., 36 Ala. 273; S. v. Moore, 39 Conn. 244; U. S. v. Bachelder, 2 Gallis. 15; Oliver v. S., 17 Ark. 508; S. v. Freeman, 8 Iowa, 428, 74 Am. D. 317; Rex v. Thanet, 27 How. St. Tr. 822; Rex v. Walsh, 1 A. & E. 481; Murphy v. S., 55 Ala. 252; S. v. Moore, 39 Conn. 244; C. v. Hubbard, 24 Pick. 98; C. v. Lee, 107 Mass. 207; S. v. Emery, 65 Vt. 464, 27 A. 167; S. v. Richardson, 38 N. H. 208, 75 Am. D. 173; S. v. Bushey, 96 Me. 151, 51 A. 872.

8. Ante, § 881 (2).

9. Vol. II, §§ 608-642; C. v. Hubbard, 24 Pick. 98; Oliver v. S., 17

2. **Every fact**—which in contemplation of the entire law of the subject, is found to be an affirmative element in the offense, should be averred.[10]

§ 884. **The Official Character**—of the assaulted or resisted person is well alleged, as in the above form,[11] by the expression "being a magistrate," etc.; or, it would be equally well to say that he "was a magistrate," etc. Nothing more, as to this, is required.[12] Yet in other respects the official character should be so designated that on the entire averment the officer will appear to be authorized to perform the particular duty.[13] Or, if he was a private person acting as a special deputy for the occasion, there should be something in the allegation distinguishing him from a general deputy and known officer.[14] Moreover it is always competent for the pleader, if he chooses, to set out the legal appointment to the office; but in such case, the proof must, it appears, sustain this allegation in form.[15] Hence—

§ 885. **The Authority of the Officer**—need not be in words averred, if it is duly manifest as the result of all the allegations.[16] Yet in some way the lawfulness of his doings must appear on the face of the averments against one for assaulting or resisting him in his office, or for any other kindred offense.[17] Moreover,—

Ark. 508; U. S. v. Bachelder, 2 Gallis. 15; U. S. v. Stowell, 2 Curt. C. C. 153; S. v. Fifield, 18 N. H. 34; P. v. Haley, 48 Mich. 495.

10. Pierce v. S., 17 Tex. Ap. 232; Horan v. S., 7 Tex. Ap. 183; S. v. Maloney, 12 R. I. 251; McGrew v. S., 17 Tex. Ap. 613; U. S. v. Fears, 3 Woods, 510; P. v. Nash, 1 Idaho, n. s. 206; S. v. Simmons, 108 Me. 239, 79 A. 1069.

11. Ante, § 881 (2).

12. Ante, § 822 and note; S. v. Hooker, 17 Vt. 658; S. v. Roberts, 52 N. H. 492; S. v. Cassady, 52 N. H. 500. And see C. v. Beckley, 3 Met. 330; Murphy v. S., 55 Ala. 252.

13. Rex v. Osmer, 5 East, 304, 308, 1 Smith, 555; S. v. Scammon, 2 Fost. N. H. 44; U. S. v. Stowell, 2 Curt. C. C. 153; S. v. Hailey, 2 Strob. 73; C. v. Doherty, 103 Mass. 443; Rex v. Everett, 8 B. & C. 114; Bowers v. P., 17 Ill. 373.

14. Rountree v. U. S., 1 Pin. 59; S. v. Moore, 39 Conn. 244. And see Putman v. S., 49 Ark. 449.

15. S. v. Copp, 15 N. H. 212; S. v. Sherburne, 59 N. H. 99.

16. S. v. Roberts, 52 N. H. 492; S. v. Cassady, 52 N. H. 500.

17. C. v. Doherty, 103 Mass. 443; S. v. Hailey, 2 Strob. 73; Cantrill v. P., 3 Gilman, 356; P. v. Hochstim, 36 Misc. 562, 73 N. Y.

§ 886. **That the Officer was acting in his Office,**—either generally or in the particular case,[18] must be shown in averment; though, for this, a distinct and separate allegation may not be required.[19]

§ 887. **The Defendant's Knowledge**—of the official character, and of the other circumstances rendering the obstruction indictable, is generally assumed to be necessary in averment. It is so, doubtless, in various forms forms of the offense and of the statutes.[20] But it is not in all cases indispensable.[21] It is essential under a statute having the word "knowingly" or its equivalent.[22] In other cases, the rule is to insert it when otherwise a *prima facie* case will not appear; when it will, this allegation may be omitted.[23]

§ 888. **An Averment of Process**—is not required where the officer, having authority to act without it, has none. And it appears that, after process executed, if the charge is, for example, that the officer had an arrested prisoner in custody, there is no need of saying by what process held.[24] But where, when obstructed, he was serving a process on the validity of which the lawfulness of his doings and the unlawfulness of the resistance depended, it, and the attendant facts, must be so far averred as to show the defendant to be, *prima facie*, guilty. This setting out must be more or less minute according to the particular case.[25]

S. 562; see Brown v. S., 42 Tex. Cr. 472, 60 S. W. 548; Vince v. S., 113 Ga. 1068, 39 S. E. 313.

18. Hill v. S., 43 Tex. 329; S. v. Gilbert, 21 Ind. 474; Bowers v. P., 17 Ill. 373; Lamberton v. S., 11 Ohio, 282, 285; S. v. Beasom, 40 N. H. 367; S. v. Hooker, 17 Vt. 658; P. v. Hubbard, 141 Mich. 96, 104 N. W. 386, 12 Det. Leg. N. 349.

19. S. v. Flagg, 50 N. H. 321; U. S. v. Bachelder, 2 Gallis. 15; S. v. Hooker, 17 Vt. 658.

20. Ante, § 881 (2); S. v. Gilbert, 21 Ind. 474; C. v. Kirby, 2 Cush. 577, 581; S. v. Hooker, 17 Vt. 658; S. v. Carpenter, 54 Vt. 551; Jones v. S., 114 Ga. 73, 39 S. E. 861.

21. C. v. Hubbard, 24 Pick. 98; S. v. Brown, 6 Wash. 609.

22. Vol. II, § 522.

23. Vol. II, §§ 521-525; S. v. Hilton, 26 Mo. 199.

24. C. v. Lee, 107 Mass. 207. But see post, § 890. See also P. v. Muldoon, 2 Par. Cr. 13; post, § 892; S. v. Russell (Iowa, 1898), 76 N. W. 653.

25. S. v. Hailey, 2 Strob. 73; U. S. v. Stowell, 2 Curt. C. C. 153; S. v. Tuell, 6 Blackf. 344; Bowers v.

§ 889. **The Act of Obstruction,**—when it consists of assault, is charged as already shown.[26] On principle, if the obstruction is of any other kind, the allegation should be in like manner specific. Yet in form of words, it must vary with the other averments and the special facts. And so, in a sort of general way, are the authorities.[27] The method of obstruction must be set out.[28] It was once apparently adjudged sufficient to say, "did with force and arms violently and unlawfully resist, prevent, and impede," etc., following simply the terms of the statute;[29] but the contrary has been held in other cases, and the correctness of this one, if such was the decision, denied.[30]

§ 890. **Ownership—(Rescuing Goods).**—According to an old case, the indictment for rescuing goods from an officer must allege their ownership, and show on what process held.[31]

§ 891. **The Proof of Official Character**—is explained in other connections.[32] Practically it is nearly always by

P., 17 Ill. 373; S. v. Dickerson, 24 Mo. 365; S. v. Hooker, 17 Vt. 658; Cantrill v. P., 3 Gilman, 356, 357; McQuoid v. P., 3 Gilman, 76; S. v. Flagg, 50 N. H. 321; S. v. Henderson, 15 Mo. 486; S. v. Beasom, 40 N. H. 367; S. v. Downer, 8 Vt. 424, 30 Am. D. 482; S. v. Fifield, 18 N. H. 34. And see S. v. Dunn, 109 N. C. 839; S. v. Estis, 70 Mo. 427; S. v. Brown, 6 Wash. 609. But see Slicker v. S., 13 Ark. 397; S. v. Bushey, 96 Me. 151, 51 A. 872; S. v. Knapf. 50 Wash, 229, 96 P. 1076. A writ, regular on its face is sufficient to protect the officer. Appling v. S., 95 Ark. 185, 128 S. W. 866.

26. Ante, § 881; S. v. Gilbert, 21 Ind. 474.

27. S. v. Downer, 8 Vt. 424, 30 Am. D. 482; S. v. Burt, 25 Vt. 373; C. v. Kirby, 2 Cush. 577; Lamberton v. S., 11 Ohio, 282, 285; Faris v. S., 3 Ohio St. 159; P. v. Smith, 131 Mich. 170, 90 N. W. 666.

28. S. v. Hailey, 2 Strob. 73.

29. U. S. v. Bachelder, 2 Gallis. 15. And see S. v. Fifield, 18 N. H. 34.

30. Lamberton v. S., supra; S. v. Johnson, cited 11 Ohio, 286; S. v. Shoemaker, cited 11 Ohio, 286. Compare with McQuoid v. P., 3 Gilman, 76; S. v. Copp, 15 N. H. 212; S. v. Roberts, 52 N. H. 492.

31. Reg. v. Lilly, 7 Mod. 63. See also S. v. Dickerson, 24 Mo. 365; ante, § 888.

32. Vol. II, § 1130 (2); ante, § 824. Proof that accused knew it was an officer required, Jones v. S., 114 Ga. 73, 39 S. E. 861. It must be proved the person resisted was an officer and that accused knew it. Pettibone v. U. S., 148 U. S. 197, 205, 13 S. Ct. 542, 37 L. Ed. 419; Merritt v. S.

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cases cited in the first volume,[41] that to authorize the warrant to be read in evidence, the officer's return should first be written thereon. But it has been answered to this that while such return is essential in a civil suit by the officer, who when seeking redress must himself appear to have fully done his duty, it is otherwise in this criminal proceeding wherein the officer is but a third person, whose act even if he destroys the warrant cannot affect the rights of the plaintiff State.[42]

§ 893. **The Officer will be Presumed**—to have performed his official functions rightly;[43] hence the indictment need not aver that he did, and if the defendant relies on his having omitted to declare his authority, it is matter simply of defense.[44]

§ 894. 1. **Variance.**—An allegation that the officer had in custody one to be examined on a charge of larceny is sustained though the larceny was in another State, and the purpose was his surrender as a fugitive from justice.[45]

2. **For resisting the Officer,**—the indictment need not give the name of the person under arrest.[46]

§ 895. 1. **Part.**—On a charge of assaulting an officer, if this aggravation is not proved, a verdict for simple assault will be good.[47] Or, if the aggravation is imperfectly set out, the conviction may be for the assault only;[48] or, for the assault, with any part of the aggravation duly alleged.[49] But—

41. Vol. I, § 187 (3).

42. S. v. Moore, 39 Conn. 244. And see Oliver v. S., 17 Ark. 508; C. v. Tobin, 108 Mass. 426; C. v. Coughlin, 123 Mass. 436; S. v. Fifield, 18 N. H. 34.

43. Vol. II, § 1131. See however, P. v. Hochstim, 36 Misc. 562, 73 N. Y. S. 626. The presumption from the officer's return may be rebutted by his own testimony. Heinze v. U. S., 181 F. 322.

44. S. v. Freeman, 8 Iowa, 428, 74 Am. D. 317; Neifeld v. S., 23 Ohio Cir. Ct. R. 246.

45. C. v. Tracy, 5 Met. 536.

46. S. v. Garrett, 80 Iowa, 589.

47. S. v. Webster, 39 N. H. 96; C. v. Cooley, 6 Gray, 350.

48. Baker v. S., 4 Pike, 56.

49. S. v. Hailey, 2 Strob. 73.

2. **Where the Indictment contains Matter negativing**—any offense, no punishment can follow for anything.[50]

II. *Other Obstructions.*

§ 896. **For refusing to assist an Officer**—in the discharge of his duties,[51] the indictment must set out his authority and such other facts as will enable the court to see that he was proceeding lawfully.[52] Then follow the averments of his command to the defendant, and the latter's refusal.[53]

§ 897. **Tampering with a Witness**—is an offense which may be committed in various ways.[54] For dissuading or otherwise hindering one from appearing and testifying in a cause, the indictment need not set out the record of such cause,[55] or say on whose behalf the witness was subpoenaed,[55a] or aver the materiality of his testimony.[55b] Matter of this sort, which is mere inducement, may be given more in general than the gist of the charge.[56] It need not allege the success of the persuasion or other measure. Nor need it conclude "to the obstruction and hindrance of public justice." [57]

50. Rex v. Osmer, 5 East, 304, 308.

51. Vol. I, §§ 185, 186.

52. S. v. Shaw, 3 Ire. 20, 22.

53. Reg. v. Sherlock (Law Rep.), 1 C. C. 20, 10 Cox C. C. 170; S. v. Nail, 19 Ark. 563; Comfort v. C., 5 Whart. 437. These cases contain precedents; and see forms in Dir. & F., §§ 844-847.

54. New Crim. Law, I, §§ 468, 695 (3), 734 (2); S. v. Curdy (Del. Gen. Sess. 1910), 75 A. 868; S. v. Holt, 84 Me. 509, 24 Atl. 951; Garland v. S., 112 Md. 83, 75 A. 631; Perrow v. S., 67 Miss. 365, 368, 7 So. 349. It need not be proved the witness was under subpoena. S. v. Keyes, 8 Vt. 57, 66, 67, 30 Am. Dec. 450; S. v. Horner, 1 Marv. (Del.) 504, 26 Atl. 73, 74; S. v. Bringgold, 40 Wash. 12, 82 P. 132; Com. v. Bailey, 87 S. W. 299, 26 Ky. L. 583; Com. v. Berry, 141 Ky. 477, 133 S. W. 212, or his evidence was relevant. Com. v. Reynolds, 14 Gray (Mass.) 87, 89, 74 Am. Dec. 665.

55. S. v. Carpenter, 20 Vt. 9.

55a. S. v. Bringgold, 40 Wash. 12, 82 P. 132 and see generally, S. v. Roe, 19 Idaho, 416, 113 P. 461.

55b. Tedford v. P., 219 Ill. 23, 76 N. E. 60.

56. Vol. II, §§ 554-558; Reg. v. Bidwell, 1 Den. C. C. 222, 227.

57. C. v. Reynolds, 14 Gray, 87, 74 Am. D. 665 (containing a form of the indictment at common law): S. v. Ames, 64 Me. 386; Chrisman v. S., 18 Neb. 107; S. v. Biebusch, 32 Mo. 276. Compare with S. v. Soragan, 40 Vt. 450. Consult Dir.

§ 898. For falsely assuming Office,[58]—the procedure follows the foregoing principles.[59]

& F., §§ 852-854. Officer's return of inability to find witness may be rebutted by his testimony and see generally. Heinze v. U. S., 104 C. C. A. 322, 181 Fed. 822.

58. New Crim. Law, I, § 468 (6) and note, 587 (2).

59. Reg. v. Buchanan, 8 Q. B. 883; C. v. Wolcott, 10 Cush. 61; Daniel v. S., 3 Heisk. 257. The forms of the indictment, Dir. & F., §§ 848, 849.

2. The defendant having been sworn to give evidence therein.
3. His testimony.
4. Its falsity.
5. Its materiality to the issue or inquiry.

§ 902. **For the Indictment**—there is no one universal form. Most of the precedents contain more or less than is clearly useless. And neither our statutes nor judicial decisions are entirely uniform as to what is essential. But in general terms the charge may be that on, etc., at, etc., a suit, described, or some other controversy or inquiry, particularized, was pending and came on for hearing before a court or persons mentioned, having competent authority in the premises; that the defendant was duly sworn as a witness therein; that it became a material question whether, etc., saying what the question was; and that thereupon he wilfully and corruptly [and feloniously, if a felony] swore, in substance and effect, among other things, so and so; whereas, in truth, etc., proceeding to negative the testimony.[61]

§ 903. **A Concluding Averment,**—similar to that in murder and manslaughter,[62] is common in the perjury indictment; as, "And so the jurors aforesaid, upon their oath aforesaid, do say that the said A [the defendant], on the

61. See, for forms, Dir. & F., §§ 869-877; 2 Chit. Crim. Law, 318 et seq.; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 566, 567, 573 (19th Ed.) 868, 882; Archb. New Crim. Pro. 600; Rex v. Cross, Trem. P. C. 136 and subsequent entries here; Reg. v. Webster, Bell, 154, 8 Cox C. C. 187; Reg. v. Moreau, 11 Q. B. 1028; C. v. Stockley, 10 Leigh, 678; P. v. Sweetman, 3 Par. Cr. 358; S. v. Corson, 59 Me. 137; C. v. Carel, 105 Mass. 582; Crusen v. S., 10 Ohio St. 258; Reg. v. Overton, 2 Moody, 263; C. v. Kimball, 108 Mass. 473; Reg. v. Shaw, Leigh & C., 579, 10 Cox C. C. 66; S. v. Anderson, 103 Ind. 170; Reg. v. Knox, 2 Cox C. C. 165. And see further as to the form in various circumstances, C. v. Kelly, 123 Mass. 417; S. v. Green, 24 Ark. 591; C. v. Roach, 1 Grat. 561; Brown v. S., 47 Ala. 47; S. v. Smith, 43 Tex. 655; S. v. Foulks, 57 Mo. 461; Flint v. P., 35 Mich. 491; Rex v. Dowlin, 5 T. R. 311; S. v. Cave, 81 Mo. 450; West v. S., 8 Tex. Ap. 119; Mattingly v. S., 8 Tex. Ap. 345; Martinez v. S., 7 Tex. Ap. 394; Dilcher v. S., 39 Ohio St. 130; S. v. Moran, 216 Mo. 550, 115 S. W. 1126. Common law indictment good under statute. S. v. Eaid, 55 Wash. 302, 104 P. 275.

62. Ante, §§ 502, 541 (1), 548-550.

delivered false testimony. Hence the allegation of the court and cause is mere introduction or inducement; and by the rules of criminal pleading, as just stated, it need not be made by direct charge or in detail; general terms will suffice.[69] Still,—

§ 906. **The Early Practice**—was in general contrary to what is thus plainly permissible. It was to recite in full the record of the court, with all the pleadings, in the cause wherein the false swearing was to be charged as having taken place;[70] and this, and perhaps more, is even sometimes assumed to have been necessary.[71] But it would be difficult to convince one who, for example, should look carefully through the large number of precedents of the indictment for perjury collected by Tremaine, all of which were prior to the statute about to be stated, that such practice was universal, or that the courts had actually adjudged it to be essential. The author confidently assumes that the statute about to be stated gave to the pleader little or no liberty not already permissible.[72] Now,—

69. Vol. II, §§ 554-558; ante, § 822 (2), 904; Reg. v. Dunning, Law Rep., 1 C. C. 290; Reg. v. Wyatt, 2 Ld. Raym. 1189, furnishes a good illustration of this doctrine. Hallock v. U. S., 107 C. C. A. 487, 185 Fed. 417; Gray v. S., 4 Okla. Cr. 292, 111 P. 825, 829; S. v. Doutte, 31 Wash. 6, 71 P. 556; Bedsole v. S., 59 Fla. 3, 52 So. 1.

70. 2 Chit. Crim. Law, 306, 307; Reg. v. Carter, 6 Mod. 167.

71. Rex v. Dowlin, 5 T. R. 311.

72. In Rex v. Hanson, Trem. P. C. 143, the allegation is simply that "in the term of Easter last past, in the court of the said lord the king, before the king himself, the said court then being held at Westminster, in the said county of Middlesex, a certain issue was joined and recorded in the said court, between one Hamlet Borer, Gent., by the name, etc., plaintiff, and one John Bingham, by the name, etc., defendant, in a plea of trespass upon the case, which issue afterward, to wit, on Wednesday the thirtieth day of May, in the eighteenth year of the reign of the said lord the now king, before John Kelynge, Knt., chief justice of the said lord the king, assigned to hold pleas before the king himself at Westminster, in the great hall of the pleas there, by the form of the statute, etc., in the due manner came to be tried, by a jury of the said country, then and there sworn and charged to try the issue aforesaid." There is no further setting out of the record or issue. To the like effect see Rex v. Trotter, Trem. P. C. 146; Rex v. Stone, Trem. P. C. 148; Rex v. Sotherton, Trem. P. C. 155. In some of the other cases it suited

§ 907. Settled by Statute.—Hereupon,
our colonial period, 23 Geo. 2, c. 11, after
amble that "by reason of difficulties attenc
for perjury and subornation of perjury," t
frequently gone unpunished, provided tha
information or indictment to be prosecuted
son for wilful and corrupt perjury, it shal
set forth the substance of the offense char;
fendant, and by what court, or before who
taken (averring such court or person or
competent authority to administer the sa
with the proper averment or averments to
ter or matters wherein the perjury or pe
assigned; without setting forth the bill, a
tion, indictment, declaration, or any part (
proceeding, either in law or equity, other th
and without setting forth the commission
the court or person or persons before wh
was committed; any law, usage, or custom
notwithstanding. § 2. In every informatic
for subornation of perjury, or for corrup
contracting with others to commit wilful a
jury, it shall be sufficient to set forth the s
offense charged upon the defendant; witho
the bill, answer, information, indictment,
any part of any record or proceeding, ei
equity, and without setting forth the com
thority of the court, or person or persons
the perjury was committed, or was agreed
be committed; any law, usage, or custom
notwithstanding." [74]

the pleader to set out only a part of the record; as, in Rex v. Brooks, Trem. P. C. 151; Rex v. H. P., Trem. P. C. 162. See post, § 907, note.

73. Omitted from the present English statute of 14 & 15 Vict. c. 100, § 20. Reg. v. Dunning (Law Rep.), 1 C. C. 290, 294. See, generally as to statutes similar to 23 Geo.

2, c. 11; Gray v.
111 P. 825; Thon
496, 59 P. 52; Fl
824, 24 S. E. 27

74. In exam
English cases, th
occasion to ref
which, in 1851,
the above; nam

§ 908. **This Statute of 23 Geo. 2, c. 11,**—is too recent to be common law in our States as having come with the immigration.[75] But our colonial courts sometimes accepted, as the guide for their decisions, a post-immigration enactment from the mother country so highly remedial, especially when declaratory of what might otherwise be deemed the correct legal rule.[76] On this ground, this statute was adopted in Maryland;[77] and in Tennessee from early times indictments were drawn after its directions, though in one case the court withheld any opinion as to whether an indict-

c. 100, §§ 20, 21. It is in substance a re-enactment of 23 Geo. 2, c. 11; thus, "§ 20. In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offense was committed. § 21. In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offense aforesaid shall have been actually committed, to allege the offense of the person who actually committed such perjury or other offense, in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offense in manner and form aforesaid to do and commit; and wherever such perjury or other offense aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of willful and corrupt perjury."

75. See Bishop First Book, § 49 et seq.

76. And see Bishop First Book, § 54.

77. Kilty Rep. Stats. 252.

ment good by it but not by the common law could be sustained.[78] On the other hand, it has been held or deemed not as of common-law force in North Carolina,[79] Virginia,[80] and Maine.[81] But—

§ 909. **Re-enacted.**—In most of our States this statute has been either re-enacted in terms, or a provision of like effect in some other form has been made; so that should we assume something more formal to have been required by the old common law of England, it is not now generally so with us,[82] though there may be a State or two in which it is.[83]

78. Lamden v. S., 5 Humph. 83. See S. v. Stillman, 7 Coldw. 341.

79. S. v. Gallimore, 2 Ire. 372.

80. Lodge v. C., 2 Grat. 579.

81. S. v. Hanson, 39 Me. 337, 339.

82. S. v. Stillman, 7 Coldw. 341; U. S. v. Deming, 4 McLean, 3; P. v. Warner, 5 Wend. 271; P. v. Phelps, 5 Wend. 9; S. v. Ammons, 3 Murph. 123; S. v. Ledford, 6 Ire. 5; Brown v. S., 47 Ala. 47; S. v. Robertson, 98 N. C. 751; P. v. Grimshaw, 33 Hun, 505; S. v. Wise, 3 Lea, 38; Davis v. S., 79 Ala. 20; S. v. Flowers, 109 N. C. 841; S. v. Booth (Iowa), 88 N. W. 344; Kizer v. P., 211 Ill. 407, 71 N. E. 1035; Maynard v. P., 135 Ill. 416, 25 N. E. 740; Thompson v. P., 26 Colo. 496, 59 P. 51; P. v. De Carlo, 124 Cal. 462, 57 P. 383; S. v. Greene, 100 N. C. 419, 5 S. E. 422; P. v. Greenwell, 5 Utah, 112, 13 P. 89; P. v. Collins, 6 Cal. Ap. 492, 92 P. 513; S. v. Cline, 146 N. C. 640, 61 S. E. 522.

83. At no very remote period, it was in Virginia adjudged necessary that an indictment for perjury in swearing to a false answer in chancery should set out the entire bill and answer. Lodge v. C., 2 Grat. 579. We have from Tennessee, an intimation that at common law the indictment for false swearing in a common law court must set out the pleadings, the proceedings on the trial, and the evidence; though it is otherwise under the Code. S. v. Stillman, 7 Coldw. 341; Lamden v. S., 5 Humph. 83; S. v. Steele, 1 Yerg. 394. And where, in North Carolina, the State statute was for a time suspended, an indictment for perjury committed on the trial of a former indictment was held to require averments of the finding of the former, and in the proper court, of the proper county; a setting out of such indictment, or so much of it as to show an offense within the county, of which the court had jurisdiction; and the traverse, or plea of the defendant, on which issue was joined. S. v. v. Gallimore, 2 Ire. 372, 375, 376. And see S. v. Ammons, 3 Murph. 123. These decisions, it is perceived, proceeded on what was assumed to be the common law of England, prior to the adoption of the statute. What is deemed by the author the true view is stated ante, §§ 904, 905.

§ 910. 1. **The Name of the Court or Official Person,**—before which or whom was the proceeding wherein the perjury is charged to have been committed, pertains to the inducement.[84] Still it is one of the identifying facts;[85] hence it must be alleged, and correctly, as known in law.[86] And where in the indictment it was "a certain Superior Court begun and holden for the District of Hillsborough," and in the statute, "Court of Pleas and Quarter Sessions," the variance was held to be fatal.[87] It is common to add, after the name of the court, the judge's name before whom the particular hearing was had; but this is believed not to be necessary,[88]—a distinction not applicable to proceedings before magistrates, and unnamed tribunals generally. In other words, the doctrine is believed to be that where the tribunal has a name, it should be averred; where not, the official person's name should be given instead; but both are never required. Still,—

2. **Variance.**—In general, if the tribunal, magistrate, or other official person is described in terms needlessly minute, the description is so far material that, to avoid a variance,

84. Ante, § 904.

85. Vol. II, §§ 566-584.

86. Kerr v. P., 42 Ill. 307; Stewart v. S., 6 Tex. Ap. 184, 187; Reg. v. Fellowes, 1 Car. & K. 115; S. v. Oppenheimer, 41 Tex. 82; S. v. Peters, 42 Tex. 7; S. v. Wilcox, 4 Blatch. 391; Reg. v. Western (Law Rep.), 1 C. C. 122; S. v. Walls, 54 Ind. 407; S. v. Kimbrough, 2 Dev. 431. See S. v. Flowers, 109 N. C. 841, 13 S. E. 718; S. v. Gross (Ind. 1911), 95 N. E. 117; S. v. Eddens, 52 La. An. 1461, 27 So. 742. Contra, Schlumbohm v. S., 5 Okla. Cr. Ap. 36, 113 P. 235. Name of court incorporated by reference, P. v. Ennis, 137 Cal. 263, 70 P. 84. See, S. v. Walker, 194 Mo. 367, 91 S. W. 899; Stefani v. S., 124 Ind. 3, 24 N. E. 254.

87. S. v. Street, 1 Murph. 156, 3 Am. D. 682.

88. S. v. Spencer, 6 Ore. 152; Smith v. P., 32 Colo. 251, 75 P. 914. See S. v. Lewis, 3 Hawks, 410; Burns v. P., 59 Barb. 531, 5 Lans. 189; Rex v. Alford, 1 Leach, 150; Rex v. Coppard, 3 Car. & P. 59; Reg. v. Fellowes, 1 Car. & K. 115; Jones v. Jones, 5 M. & W. 523; Reg. v. Dunn, 2 Moody, 297; Reg. v. Schlesinger, 10 Q. B. 670; Reg. v. Child, 5 Cox C. C. 197. These English cases are stated somewhat in detail in 3 Russ. Crimes (5th Eng. Ed.), 44-46. They are silent as to whether the name of the judge must be averred, but explain how far a variance in setting it out will be fatal. See, Kizer v. P., 211 Ill. 407, 71 N. E. 1035.

it must be proved as laid.[89] But sometimes n
general sort, not being descriptive, may be rej
plusage.[90] These are questions depending on
rules of evidence, so requiring no further
here.[91]

§ 910 a. 1. **A Jurisdiction**—in the court o
son being an element without which there ca
jury, such jurisdiction, we have seen,[92] must
be disclosed by the allegations.[93] Since such n
inducement,[94] it would in principle suffice ei
in words that the jurisdiction existed, or state
in law it results, both not being required; in a
rule as to the materiality of that to which the
fied.[95] And so, in our States generally, are the
But—

2. **Further as to which.**—Where the statut
2, c. 11, or an American one in the same term
the words whereof are "averring such court
persons to have competent authority to ad
same," it would seem that this special alleg
be supplied by the other.[98] Yet in other resp

89. Rex v. Dowlin, 5 T. R. 311, 317; Reg. v. Child, 5 Cox C. C. 197; Rex v. Schoole, Peake, 112; Rex v. Lincoln, Russ. & Ry. 421; Wilson v. S., 115 Ga. 206, 41 S. E. 696.

90. S. v. Langley, 34 N. H. 529; Reg. v. Child, supra.

91. And see Reg. v. Dunn, 2 Moody, 297; Rex v. Bellamy, Ryan & Moody, N. P. 171; S. v. Clark, 2 Tyler, 277, 282; S. v. Farrow, 10 Rich. 165; U. S. v. Deming, 4 McLean, 3; S. v. Hanson, 39 Me. 337; S. v. Ledford, 6 Ire. 5; Reg. v. Christian, Car. & M. 388; S. v. Thayer, 4 Strob. 286; Rex v. Alford, 1 Leach, 150, 14 East, 218, note; Rex v. Lincoln, Russ. & Ry. 421; Reg. v. Hewins, 9 Car. & P. 786; Rex v. Israel, 8 D. & R. 234; Conner v. C., 2 Va. Cas. 30; Reg. v.
Q. B. 670; Reg. v. I
& K. 115; Rex v. I
311; S. v. Kimbrou

92. Ante, § 905.

93. S. v. McCone,
A. 406; S. v. Plumm
S. v. Thibodeaux, 49
So. 127.

94. Ante, §§ 904,

95. Post, § 921.

96. Anderson v.
17; Powers v. S., 17
S. v. Belew, 79 Mo.
3 Lea, 38; and cas
paragraph. Ferrell
1910), 127 S. W. 16

97. Ante, §§ 907-

98. Reg. v. Dunni
1 C. C. 290, 294; S. v
Iowa, 447.

cumstances, the rule is as above stated.[99] Where there is doubt, it may be recommended as the safer course, and never difficult, so to shape the averment of the court or official person as to render its or his jurisdiction affirmatively palpable, whether the other allegation is made or not. And a charge simply that the perjury was committed at an examination before C, "a commissioner of the United States duly appointed," there being duly-appointed commissioners without as well as with authority to take examinations, was well held to be inadequate.[1]

§ 911. 1. **Stating Court, etc.**—Assuming it not to be necessary to recite the proceedings wherein the perjury is to be alleged as committed,[2] the indictment may say that on, etc., at, etc.,[3] before a court, etc., named, an issue, the particulars whereof need not be given, between parties named, came on to be and was in due form of law heard and tried.[4] And the fact that such trial ended in a nonsuit

99. Reg. v. Dunning, supra; S. v. Newton, 1 Greene (Iowa), 160, 48 Am. D. 367; S. v. Walls, 54 Ind. 407; S. v. Keel, 54 Mo. 182; S. v. Peters, 42 Tex. 7; Stewart v. S., 6 Tex. Ap. 184; U. S. v. Quinn, infra; Lavey v. Reg., 17 Q. B. 496, 2 Den. C. C. 504, 5 Cox C. C. 269, 7 Eng. L. & Eq. 401; Reg. v. Lawlor, 6 Cox C. C. 187.

1. U. S. v. Wilcox, 4 Blatch. 391. See U. S. v. Quinn, 8 Blatch. 48, 66; Reg. v. Fairburn, 3 Russ. Crimes (5th Eng. Ed.) 38.

2. Ante, §§ 905-909. Contra, S. v. Koslowesky, 228 Mo. 351, 128 S. W. 741.

3. S. v. Oppenheimer, 41 Tex. 82; S. v. Hanson, 39 Me. 337; Wood v. P., 3 Thomp. & C. 506, 1 Hun, 381; S. v. Schultz, 57 Ind. 19; Burns v. P., 59 Barb. 531; Rhodes v. C., 78 Va. 692. And see U. S. v. Bowman, 2 Wash. C. C. 328; Keator v. P., 32 Mich. 484; C. v. Alden, 14 Mass. 388.

4. Ante, § 902; Reg. v. Dunning (Law Rep.), 1 C. C. 290, 293, 11 Cox, C. C. 651; Rex v. Dowlin, 5 T. R. 311, 320; S. v. Newton, 1 Greene (Iowa), 160, 48 Am. D. 367; S. v. Green, 24 Ark. 591; S. v. Schill, 27 Iowa, 263; Reg. v. Schlesinger, 10 Q. B. 670; Lavey v. Reg., 17 Q. B. 496, 2 Den. C. C. 504, 5 Cox C. C. 269, 7 Eng. L. & Eq. 401; Reg. v. Lavey, 3 Car. & K. 26; S. v. Walls, 54 Ind. 407; Rex v. Roper, 1 Stark. 518, 6 M. & S. 327; Rex v. Bailey, 7 Car. & P. 264; Rex v. Israel, 3 D. & R. 234; S. v. Flagg, 25 Ind. 396; S. v. Harvell, 4 Jones (N. C.) 55. And see Pennaman v. S., 58 Ga. 336; S. v. Witham, 6 Ore. 366; S. v. Sleeper, 37 Vt. 122; P. v. Gaige, 26 Mich. 30. The forms actually appearing in the cases have, in general, a little more of detail than the bare statement of the text indicates.

will not render such form of allegation objectionable.[5]

2. **As to Time,**—we saw in the first volume the special importance in this offense of avoiding the descriptive form of alleging it; and how the consequences which in some cases resulted from carelessness herein have led to the misapprehension in some courts that the common law requires, in perjury, the allegation and proof of time exactly to correspond,—matter already sufficiently explained.[6]

3. **Not in Court.**—Where the alleged perjury is in an affidavit, or in any other proceeding elsewhere than in a court, the indictment, having shown the authority of the acting officer as already explained,[7] must aver whatever other fact is, in the individual instance, a necessary part of the foundation for such proceeding. The fact, thus to be set out, will vary with the differing laws of the States.[8]

4. **Variance.**—The proceedings should be carefully set out in a way to avoid a variance at the trial. It will gener-

And it would not be possible to say that some courts might not require more. Plainly enough, on principle, and on the reasoning in most of the cases, nothing more is needed in this part of the indictment. Generally the allegation mentions, with the court, the jury and its being sworn. But the jury is a part of the court, without which the judge may sit or not, according to the nature of the business being done; and it would be difficult to find a reason requiring a mention of this part, while the averment is properly silent as to the clerk, by whom the oath, the falsity whereof is the very gist of the offense, was administered. See Dir. & F., §§ 871, 872, 875.

5. Reg. v. Bray, 9 Cox C. C. 218.

6. Vol. I, § 401 (4, 5); Lucas v. S., 27 Tex. Ap. 322; S. v. Peters, 107 N. C. 876, 12 S. E. 74; C. v. Monahan, 9 Gray, 119; S. v. Ah Lee, 18 Ore. 540, 23 P. 424; cases cited to the last paragraph.

7. Ante, § 910a.

8. Morrell v. P., 32 Ill. 499; King v. Reg., 14 Q. B. 31, 3 Cox C. C. 561; Reg. v. Pearsons, 8 Car. & P. 119; Rex v. Koops, 6 A. & E. 198; Reg. v. Gardiner, 2 Moody, 95; Reg. v. Bishop, Car. & M. 302; Rex v. Dudman, 7 D. & R. 324, 4 B. & C. 850; Johnson v. S., 58 Ga. 397; Ryalls v. Reg., 13 Jur. 259, 18 Law, J., n. s., M. C. 69; P. v. Fox, 25 Mich. 492; Reg. v. Virrier, 12 A. & E. 317; S. v. Reynolds, 108 Ind. 353, 9 N. E. 287; S. v. Crumb, 68 Mo. 206. See P. v. Tredway, 3 Barb. 470; P. v. Phelps, 5 Wend. 9; P. v. Warner, 5 Wend. 271; Pennaman v. S., 58 Ga. 336; Young v. Young, 18 Minn. 90; C. v. Warden, 11 Met. 406; S. v. Day, 108 Minn. 121, 121 N. W. 611.

ally be fatal,—a question depending on the common principles governing the law of variance.[9]

§ 912. Secondly. *How to allege the Swearing*:—

1. **Setting out of Oath.**—It is common, where the perjury was on a trial in court, to say that the defendant appeared as a witness for a party named, and was then and there sworn, etc., that the evidence which he should give, etc., should be, etc., setting out the full oath in form.[10] But—

2. **The Shorter Allegation**—that the defendant was "duly sworn," not further stating the ceremonies, has been well adjudged sufficient.[11] Or the mere substance of the oath may be given.[12] Or, on principle, it would suffice to say that on the trial of the issue the defendant gave such and such testimony on his oath duly administered and taken.[13] This, indeed, accords with what is practised on an indictment for a—

9. S. v. Ammons, 3 Murph. 123; Rex v. Lookup, cited 1 T. R. 240; Rex v. May, 1 Doug. 193, 1 T. R. 237, note; Keator v. P., 32 Mich. 484; Rex v. Dudman, 7 D. & R. 324, 4 B. & C. 850; Rex v. Windus, 1 Camp. 406, note; Rex v. Powell, Ryan & Moody, N. P. 101; P. v. Burroughs, 1 Par. Cr. 211; Rex v. Roper, 1 Stark. 518, 6 M. & S. 327; Rex v. Thomas, 1 Car. & P. 472; Reg. v. Moreau, 11 Q. B. 1028; Brown v. S., 47 Ala. 47; S. v. Smith, 84 Kan. 646, 114 P. 1074; Wolf v. Com., 143 Ky. 273, 136 S. W. 193; Blevins v. S., 85 Ark. 95, 107 S. W. 393; Jackson v. S., 156 Ala. 93, 161, 47 So. 77.

10. See the places referred to ante, § 902.

11. S. v. Farrow, 10 Rich. 165; Dodge v. S., 4 Zab. 455; Rex v. McCarther, Peake, 155; Tuttle v. P., 36 N. Y. 431; S. v. O'Hagan, 38 Iowa, 504; Massie v. S., 5 Tex. Ap. 81, 84; Patrick v. Smoke, 3 Strob. 147; Burns v. P., 59 Barb. 531, 5 Lans. 189. And see Jackson v. S., 15 Tex. Ap. 579; P. v. Ennis, 137 Cal. 263, 70 P. 84; P. v. Bradbury, 155 Cal. 808, 103 P. 215; Adkinson v. S., 59 Fla. 1, 51 So. 818; P. v. Collins, 6 Cal. Ap. 492, 92 P. 513; Fudge v. S., 57 Fla. 7, 49 So. 128; Phillips v. S., 5 Ga. Ap. 597, 63 S. E. 637; S. v. Day, 108 Minn. 121, 121 N. W. 611; Schlumbohm v. S., 5 Okla. Cr. 36, 113 P. 265. "In due form of law" sufficient. S. v. Mercer, 101 Md. 535, 61 A. 220.

12. P. v. Warner, 5 Wend. 271. See, under Alabama statute, Hendrix v. S., 50 Ala. 148.

13. See, as more or less confirmatory of this view, C. v. Warden, 11 Met. 406; S. v. Bobbitt, 70 N. C. 81; Williams v. S., 7 Humph. 47; S. v. Webber, 78 Vt. 463, 62 A. 1018.

3. **False Affidavit.**—The allegation here may be that on, etc., at, etc., setting out the introductory matter,[14] the defendant produced before the official person named a certain affidavit in writing of him the defendant, and was then and there, in due form of law, sworn before such person concerning the truth of the matters therein contained, and then and there upon his oath aforesaid did falsely, etc., depose and swear, etc.[15] But—

4. **That the Defendant was Sworn**—must in some form be directly charged; mere inference will not suffice.[16] Thus, "Made and subscribed in open court, wickedly, falsely, wilfully, corruptly, and knowingly, the following false and corrupt oath, which is in substance as follows," setting out the affidavit, was held inadequately to aver the swearing.[17]

§ 913. 1. **Variance and Surplusage.**—If with needless particularity the oath or the method of taking it is set out, still it must in general be correspondingly proved, or the variance will be fatal. Thus,—

2. **"On Gospels"—Uplifted Hand.**—If the oath is needlessly averred to have been taken on the Gospels, proof that it was with the uplifted hand will not suffice.[18] But—

3. **The Term "Corporal Oath"**—means only "solemn oath," or one to which the bodily assent is given;[19] and

14. Ante, §§ 910a, 911.

15. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 566, 567 (19th Ed.)-868; Dir. & F. §§ 873, 874; Rex v. Emden, 9 East, 437; Rex v. Crossley, 7 T. R. 311, 315; Williams v. S., 7 Humph. 47; S. v. Ellison, 8 Blackf. 225. "The books, both ancient and modern, have been examined. All the indictments for perjury upon an affidavit state the charge in one of two ways, either that he did corruptly say, depose, swear and make affidavit in writing (amongst other things) in substance and to the effect following, that is to say, setting out the affidavit; or that he did produce and exhibit a certain affidavit in writing, to which he swore, and then set it forth, in substance and to the effect following, that is to say." Riker, R. in P. v. Robertson, 3 Wheeler Crim. Cas. 180, 191. See Copeland v. S., 23 Miss. 257; P. v. Collins, 6 Cal. Ap. 462, 92 P. 513.

16. S. v. Hamilton, 65 Mo. 667; S. v. Divoll, 44 N. H. 140; U. S. v. McConaughy, 33 Fed. Rep. 168; Adkinson v. S., 59 Fla. 1, 51 So. 818.

17. S. v. Divoll, supra.

18. S. v. Porter, 2 Hill (S. C.) 611.

19. New Crim. Law, II, § 1018 (5), note.

an averment of it may be proved by an oath taken in the ordinary form.[20]

§ 914. 1. **The Authority to administer the Oath,**—in the official person or tribunal, must in some way appear in allegation.[21] We have seen that, by 23 Geo. 2, c. 11, § 1, this must be averred expressly; but not by the present English statute, or by statutes prevailing in all our States.[22] Aside from what is thus commanded, it is sufficient either that the indictment declares the authority, or that it follows as of law from what is for other purposes set out.[23] In a section just back,[24] this is in part explained; and doubtless what is sufficient for the purpose there stated will ordinarily satisfy also the requirement of this section. And—

2. **The Authorized Person or Tribunal**—must in some way appear in allegation to have administered the oath.[25] To say that it was before, etc., suffices.[26] And doubtless a separate form of words for alleging this will not often be required, but the matter will be sufficiently disclosed by the other averments.

20. S. v. Norris, 9 N. H. 96; Jackson v. S., Smith (Ind.) 124, 1 Ind. 184.

21. S. v. Owen, 73 Mo. 440; S. v. Byrd, 28 S. C. 18, 13 Am. St. 660; Bradberry v. S., 7 Tex. Ap. 375; Stewart v. S., 6 Tex. Ap. 184. See S. v. Boland, 12 Mo. Ap. 74; Phillips v. S., 5 Ga. Ap. 597, 63 S. E. 667.

22. Ante, §§ 907-909; Kizer v. P., 211 Ill. 407, 71 N. E. 1035; S. v. Harter, 131 Iowa, 199, 108 N. W. 232.

23. See, and compare, Rex v. Callanan, 6 B. & C. 102, 9 D. & R. 97 (and see 2 Russ. Crimes (3d Eng. Ed.) 638); Rex v. Wood, 2 Russ. Crimes (3d Eng. Ed.) 632; Walker v. Reg., 8 Ellis & B. 439; Reg. v. Goodfellow, Car. & M. 569; Halleck v. S., 11 Ohio, 400; S. v. Plummer, 50 Me. 217; Reg. v. Dunning (Law Rep.), 1 C. C. 290; P. v. Bradbury, 155 Cal. 808, 103 P. 215; Goslin v. Com., 121 Ky. 698, 90 S. W. 223.

24. Ante, § 910a.

25. Campbell v. P., 8 Wend. 636; S. v. Hamilton, 65 Mo. 667. See S. v. O'Hagan, 38 Iowa, 504; Biggerstaff v. C., 11 Bush, 169; Adkinson v. S., 59 Fla. 1, 51 So. 818. Compare, S. v. Thothos, 147 Mo. Ap. 596, 126 S. W. 797.

26. Campbell v. P., supra; S. v. Ellison, 8 Blackf. 225. See Keator v. P., 32 Mich. 484; Reg. v. Tew, Dears. 429, 29 Eng. L. & E. 537; Oaks v. Rodgers, 48 Cal. 197; C. v. Alden, 14 Mass. 388. As to Indiana, under the statute, see Hitesman v. S., 48 Ind. 473; Barnard v. U S, 89, C. C. A. 376, 162 F. 618; S. v. Townley, 67 Ohio 21, 65 N. E. 149; S. v. Dineen, 203 Mo. 628, 102 S. W. 480; S. v. Harter, 131 Iowa, 199, 108 N. W. 232.

common.[33] No judicious pleader will needlessly say "tenor," because that will compel an uncomfortable exactness in proof.[34]

§ 916. 1. **In stating the Substance and Effect,**—reasonable fulness and particularity are required; for, within a distinction already mentioned,[35] they pertain, not to inducement, but to the gist of the offense. It is not adequate to say simply that the defendant swore falsely concerning a thing; the direct meaning of what is said must be given.[36] Nor will any setting out which varies the sense of what was sworn to be accepted as its substance or effect.[37] Yet a departure in mere form is immaterial.[38] Hence,—

2. **The Interrogatories,**—in answer to which the perjury was committed, need not be given.[39]

3. **The Substance of All**—that the witness testified to is not required, but merely of what is to be relied on as false.[40]

33. Rex v. Leefe, infra; S. v. Groves, Busbee, 402; Rex v. Taylor, 1 Camp. 404; P. v. Bradbury, 155 Cal. 808, 103 P. 215.

34. Rex v. Leefe, 2 Camp. 134.

Affidavit. It is ordinarily not inconvenient to set out an affidavit or other written matter by its tenor, and this appears to be required in Indiana. Coppack v. S., 36 Ind. 513. Compare with Rex v. Taylor, 1 Camp. 404. There is excellent ground of principle for this view; and something like this was said, as matter of principle, in the earlier editions of this work. Still, it seems to me on reflection, that on a question of this sort the command of principle is hardly strong enough to overcome a course of precedents. However, in Tremaine, the majority of the precedents, in this class of perjury, not the other, give the very words. For example, Rex v. Brooks, Trem. P. C. 151, 153, 154; Rex v. Sotherton, Trem. P. C. 155, 156; Rex v. Hutchinson, Trem. P. C. 164, 166. We have seen that by the English statute the substance only is required in these cases the same as in others, Rex v. Callanan, 6 B. & C. 102; and this is probably so also in many of our States.

35. Ante, §§ 904, 905.

36. U. S. v. Morgan, Morris, 341; P. v. Robertson, 3 Wheeler Crim. Cas. 180, 189; S. v. Gordon, 196 Mo. 185, 95 S. W. 420; S. v. Allen, 94 Mo. Ap. 508, 69 S. W. 604; S. v. Terline, 23 R. I. 530, 51 A. 204.

37. Rex v. Taylor, 1 Camp. 404; S. v. Tappan, 1 Fost. (N. H.) 56.

38. Rex v. Grindall, 2 Car. & P. 563; Cox v. S., 13 Tex. Ap. 479; Reg. v. Bird, 17 Cox C. C. 387.

39. S. v. Bishop, 1 D. Chip. 120, 124. See Dodge v. S., 4 Zab. 455; Clay v. S., 52 Tex. Cr. 555, 107 S. W. 1129.

40. Campbell v. P., 8 Wend. 636; S. v. Neal, 42 Mo. 119; Hague v. U. S. (C. C. A. 1911), 184 Fed. 245.

If parts only are averred, it is practically best to introduce them in the same way as in libel;[41] and putting them into one count does not render it double.[42] Still it is not legally objectionable to lay the matter as continuous, if what is omitted does not vary the meaning of what is given.[43]

4. **If an Omission from a Bankrupt's Schedule**—constitutes the perjury, the items rendered need not be stated,[44] but the omitted ones must be.[45]

§ 917. **Innuendoes**—are sometimes required to explain what the defendant is alleged to have sworn to.[46] Their nature and use are stated under the title "Libel and Slander."[47] They are the same here as there.

§ 918. Fourthly. *The Averments to show the Testimony false*:—

Assignment of Perjury—is the name commonly given to this part of the indictment. After stating the substance of what was sworn to, as just explained, it proceeds: "whereas, in truth and in fact," adding wherein such matter was false. This is of the gist of the offense, not mere inducement;[48] consequently the allegation must be direct and specific, not in terms of uncertain meaning, or by way of implication.[49] Simply to say, for example, that the defend-

41. Ante, §§ 783 (3), 791, 792.

42. S. v. Bordeaux, 93 N. C. 560; S. v. Joiner, 128 La. 876, 55 So. 560.

43. Rex v. Solomon, Ryan & Moody, N. P. 252; Rex v. Callanan, 6 B. & C. 102. And see Rex v. Leefe, 2 Camp. 134, compared with Reg. v. Rhodes, 2 Ld. Raym. 886.

44. U. S. v. Chapman, 3 McLean, 390.

45. U. S. v. Chapman, supra; Rex v. Hepper, Ryan & Moody, N. P. 210, 211, 1 Car. & P. 608.

46. Dir. & F., § 872; Rex v. Gripe, 1 Comyns, 43; s. c. nom. Rex v. Griepe, 1 Ld. Raym. 256, 259; Rex v. Aylett, 1 T. R. 63, 69; Rex v. Taylor, 1 Camp. 404; Reg v. Virrier, 12 A. & E. 317; Reg. v. Parker, Car. & M. 639.

47. Ante, §§ 793, 794 and note.

48. Ante, §§ 904, 905; Moore v. S., 91 Miss. 250, 44 So. 817; Com. v. Miles, 140 Ky. 577, 131 S. W. 385; Gray v. S., 4 Okla. Cr. 292, 111 P. 825.

49. Gibson v. S., 44 Ala. 17; Burns v. P., 59 Barb. 531; Gabrielsky v. S., 13 Tex. Ap. 428; P. v. Clements, 107 N. Y. 205, 13 N. E. 782, 42 Hun, 353; S. v. Coyne, 214 Mo. 344, 114 S. W. 8; Fudge v. S., 57 Fla. 7, 49 So. 128; Lowe v. S., 59 Tex. Cr. Ap. 557, 129 S. W. 842; S. v. Smalls, 63 Wash. 172, 115 P. 82.

ant *falsely* swore, is not adequate.[50] Or if the indictment sets out two contradictory oaths, taken at different times, an assignment is not good which does not say which was the false one.[51]

§ 919. **This Averment will vary**—with the matter to be negatived. It must be certain; so that if all it sets out may be true yet no perjury have been committed, it will be inadequate.[52] It must particularize wherein the testimony was false, a general allegation that it was so not being commonly sufficient.[53] While in some connections a short negative will satisfy this requirement, in others much amplification will be necessary.[54] One good assignment of what constitutes a complete offense, is adequate, though the other assignments are ill.[55]

§ 920. **Where the Defendant's Belief**—was the thing testified to, it is not enough to negative the thing; the belief must be negatived.[56] Where the fact requires negation, it suffices to say that the defendant "well knew" it was not so.[57]

50. Rex v. Perrott, 2 M. & S. 379; S. v. Mace, 76 Me. 64. See S. v. Corson, 59 Me. 137; P. v. Vogt, 159 Mich. 594, 121 N. W. 293, 16 Det. Leg. N. 189; P. v. Tatum, 22 N. Y. Cr. R. 257, 60 Misc. 311, 112 N. Y. S. 36.

51. Rex v. Harris, 1 D. & R. 578, 5 B. & Ald. 926. See Reg. v. Wheatland, 8 Car. & P. 238.

52. Reg. v. Whitehouse, 3 Cox C. C. 86; S. v. Joiner, 128 La. 876, 55 So. 560; Fudge v. S., 57 Fla. 7, 49 So. 128.

53. S. v. Mumford, 1 Dev. 519, 17 Am. D. 573. See Reg. v. Parker, Car. & M. 639; P. v. Bradbury, 155 Cal. 808, 103 P. 215; S. v. Loos, 145 Iowa, 170, 123 N. W. 962; U. S. v. Freed, 179 Fed. 236; Anderson v. Com. (Ky. 1908), 117 S. W. 364; P. v. Vogt, 156 Mich. 594, 121 N. W. 193; S. v. Rhodes, 220 Mo. 9, 119 S. W. 391; S. v. Eaid, 55 Wash. 302, 104 P. 275; P. v. Collins, 6 Cal. Ap. 492, 92 P. 513; S. v. Roche, 137 Iowa, 387, 114 N. W. 1034.

54. Rex v. Atkinson, 2 Deac. Crim. Law, 1017; De Bernie v. S., 19 Ala. 23; Dodge v. S., 4 Zab. 455; Reg. v. Bennett, 2 Den. C. C. 240, 4 Eng. L. & Eq. 560; C. v. Sargent, 129 Mass. 115; Lawson v. S., 3 Lea, 309; Turner v. S., 30 Tex. Ap. 691. Negative assignment should follow language of indictment. S. v. Allen, 94 Mo. Ap. 508, 69 S. W. 604.

55. C. v. McLaughlin, 122 Mass. 449; S. v. Eaid, 55 Wash. 302, 104 P. 275.

56. S. v. Lea, 3 Ala. 602; S. v. Cruikshank, 6 Blackf. 62; S. v. Coyne, 214 Mo. 344, 114 S. W. 8.

57. S. v. Lindenburg, 13 Tex. 27; S. v. Wood, 17 Iowa, 18; S. v. Loos, 145 Iowa, 170, 123 N. W. 962.

§ 921. Fifthly. *The Avermen False Testimony:—*

Either of Two Methods.—The testimony to the issue or point of element in the offense,[58] it must l der, in doing this, may at his ele material, or set out facts from wl law appear. He need not do bot mony was delivered in a trial, t method, and the better practicall seem to require it, to the exclusi

58. New Crim. Law, II, §§ 1030-1042; S. v. Thomas (Del. 1910), 78 A. 640; Shevalier v. S., 85 Neb. 366, 123 N. W. 424; P. v. Teal, 196 N. Y. 372, 89 N. E. 1086; S. v. Cline, 150 N. C. 854, 64 S. E. 591; McMurtry v. S., 38 Tex. Cr. Ap. 521, 43 S. W. 1010.

59. Wood v. P., 59 N. Y. 117; Watson v. S., 5 Tex. Ap. 11; S. v. McCormick, 52 Ind. 169; Hendricks v. S., 26 Ind. 493; Stofer v. S., 3 W. Va. 689; S. v. Holden, 48 Mo. 93; S. v. Bowlus, 3 Heisk. 29; S. v. Davis, 69 N. C. 495; U. S. v. McHenry, 6 Blatch. 503; S. v. Thrift, 30 Ind. 211; S. v. Chandler, 42 Vt. 446; Reg. v. Harvey, 8 Cox C. C. 99; S. v. Maxwell, 28 La. Ann. 361; Reg. v. Cutts, 4 Cox C. C. 435; Geston v. P., 4 Lans. 487; s. c. nom. Guston v. P., 61 Barb. 35; S. v. Shanks, 66 Mo. 560; P. v. Burroughs, 1 Par. Cr. 211; P. v. Fox, 25 Mich. 492; S. v. Sleeper, 37 Vt. 122; Reg. v. Southwood, 1 Fost. & F. 356; S. v. Trask, 42 Vt. 152; Hoch v. P., 3 Mich. 552; C. v. John, 6 Gray, 274; Rex v. Dowlin, 5 T. R. 311, 318; S. v. Beard, 1 Dutcher, 384; S. v. Hall, 7 Blackf. 25; S. v. Johnson, 7 Blackf. 49; S. v. Cham-

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the perjury was in an affidavit, the latter method is perhaps the more common.[60]

§ 922. Sixthly. *Some other Questions*:—

Qualifying Adjectives.—The common law indictment avers that the perjury was delivered "falsely, corruptly, knowingly, wilfully, and maliciously," or in a part of these words, or in others of a like meaning. It should be distinguished from that on 5 Eliz. c. 9,[61] where both "wilfully" and "corruptly" were necessary because they are the statutory terms.[62] Yet these two are also specially appropriate

70 P. 84; P. v. Collins, 6 Cal. Ap. 492, 92 P. 513; P. v. Schweichler, 16 Cal. Ap. 738, 117 P. 939; Askew v. S., 3 Ga. Ap. 79, 59 S. E. 311; S. v. Smith, 126 La. 135, 52 So. 244; Shaffer v. S., 87 Md. 124, 39 A. 313; S. v. Mercer, 101 Md. 535, 61 A. 220; P. v. Vogt, 156 Mich. 594, 121 N. W. 293, 16 Det. Leg. N. 189; S. v. Rhodes, 220 Mo. 9, 119 S. W. 391; P. v. Tatum, 22 N. Y. Cr. R. 557, 60 Misc. 311, 112 N. Y. S. 36; P. v. Tillman, 124 N. Y. S. 44, 139 Ap. Div. 572, reversing 118 N. Y. S. 442, 63 Misc. Rep. 461, 95 N. E. 1136, 201 N. Y. 498; P. v. Peck, 130 N. Y. S. 967; Barnes v. S., 15 Ohio Cir. Ct. R. 14; Wynne v. S., 60 Tex. Cr. 660, 133 S. W. 682; Miller v. S., 43 Tex. Cr. Ap. 367, 65 S. W. 908; Yardley v. S., 55 Tex. Cr. Ap. 486, 117 S. W. 146; Barnard v. U. S., 89 C. C. A. 376, 162 F. 618; Ammerman v. U. S., 108 C. C. A. 1, 185 Fed. 1, reversing judgment. U. S. v. Ammerman (D. C. 1910), 176 Fed. 635; Dickerson v. S., 18 Wyo. 440, 111 P. 857; S. v. Argo, 118 Tenn. 377, 100 S. W. 106; but see Wilkinson v. S., 226 Ill. 135, 80 N. E. 699.

60. In P. v. Robertson, 3 Wheeler Crim. Cas. 180, 188, Mr. Recorder Riker said: "The precedents of indictments upon affidavits never contain an averment that the facts stated in such affidavits are material. The indictments state that the affidavits were duly made before a competent authority, setting forth the tenor or substance of it (them), and then falsifying such parts as are alleged to be untrue. These precedents, being uniform and undisputed, show what the law is." But he does not mean that the materiality need in no way appear; for, on the preceding page, he says: "Every affidavit, if drawn in due form of law, shows the materiality of the fact upon the face of it. Any averment, therefore, is idle." This may be so when it is considered in connection with the introductory averments. Ante, §§ 910a, 912. But in our American precedents, the materiality of an affidavit is sometimes directly averred. It must, of course, in some way appear. And see P. v. Fox, 25 Mich. 492; Hoch v. P., 3 Mich. 552; P. v. Kelly, 59 Cal. 372; S. v. Lloyd, 77 Wis. 630, 46 N. W. 898; S. v. Cunningham, 66 Iowa, 94, 23 N. W. 280.

61. New Crim. Law, II, § 1049 (2).

62. Rex v. Cox, 1 Leach, 71; Rex v. Taylor, 1 Show. 190; Hamper's

to the common law indictment, and either equivalent are indispensable.[63] Particularly, pear, is "wilfully;" because it is in all the Yet "falsely, maliciously, wickedly, and corr ting "wilfully," have been held adequate.[65] say "wilfully and corruptly,"[66] or even "k corruptly,"[67] without more. "Falsely" can tial, because the assignment of the perjury av ing to be false.[68] "Feloniously" should be rest where the offense is felony.[69]

§ 923. It was held not Ill as Repugnant—t in July, the defendant swore to having witnes tion in October of the same year; because givi sible date does not necessarily render the tes

§ 924. In Brief,—the indictment for this o every other, must aver its several elements, an individualize the transaction and make a *prin* but it need do no more.[71] It must so present that it will appear, to the judicial understa

Case, 2 Leon. 211; Meller's Case, 3 Inst. 167; Lembro's Case, Cro. Eliz. 147; Anonymous, Cro. Eliz. 201.

63. Rex v. Richards, 7 D. & R. 665; Rex v. Stevens, 5 B. & C. 246; S. v. Smith, 63 Vt. 201; Morgan v. S., 63 Miss. 162; S. v. Morse, 90 Mo. 91, 2 S. W. 137; S. v. Davis, 84 N. C. 787; Wilkinson v. P., 226 Ill 135, 80 N. E. 699; Blevins v. S., 85 Ark. 195, 107 S. W. 393. But see U. S. v. Hearing, 26 Fed. Rep. 744.

64. New Crim. Law, II, § 1015 (1) and note. And see S. v. Bixler, 62 Md. 354.

65. Rex v. Cox, 1 Leach, 71. To the like effect, S. v. Spencer, 45 La. Ann. 1, 12 So. 135.

66. S. v. Carland, 3 Dev. 114; S. v. Sleeper, 37 Vt. 122; Johnson v. P., 94 Ill. 505.

67. U. S. v. Bab 113.

68. But see Reg. & K. 317. Comp § 168. And see und v. Harris, 145 N. (115.

69. Vol. II, §§ 53 liams, 30 Mo. 364; Mo. 368; Wile v. S Reg. v. Crawley, 12

70. S. v. McKenn

71. Rahm v. S., 28 Am. St. 911; St Tex. Ap. 297; U. S Fed. Rep. 644; S. v. Mo. 549; S. v. Spen 1, 12 So. 135; Ralph 88; S. v. Blackston Dennis v. S., 17 Fla. S., 13 Tex. Ap. 163; 11 Abb. N. Cas. 122.

one wherein false swearing is perjury.[72] Hence it must it was in a judicial proceeding or course of justice.[73] The materiality of what was sworn to must be charged or otherwise be made palpable.[74] Wilfulness, in terms or by an equivalent, must be averred.[75] And it must appear from all the allegations, or be directly said, that an issue, duly joined, came on for trial, that the court had competent authority to hear it and administer the oath,—did administer it,—such and such testimony was given, and in such and such particulars it was false.[76]

§ 925. Seventhly. *The Indictment on the Statutes:—*

1. **Not distinguishable**—is the statutory from the common law indictment for perjury, in anything not within the ordinary rules for indictments on statutes.

2. **The Statutory Terms**—must be covered;[77] as, where by them it was specially punishable to "commit perjury on any trial for *felony*," an averment, in Missouri where there were statutory larcenies which were not felony, that the perjury was on a trial for "larceny," was ill.[78] So,—

§ 926. 1. **"Deliberately and Wilfully"**—are statutory terms in Texas, hence they must there be in the indictment.[79] And—

2. **On a Statute which has changed the Definition**—of perjury in any of its elements, the indictment must conform to the statutory definition.[80]

72. Ante, §§ 910-911; Snowde v. ——, Cro. Car. 321, 322; S. v. Keene, 26 Me. 33; Reg. v. Rawlins, 8 Car. & P. 439; Reg. v. Pearson, 8 Car. & P. 119; Rex v. Dunn, 1 D. & R. 10; Steinston v. S., 6 Yerg. 531; S. v. Farrow, 10 Rich. 165; P. v. Phelps, 5 Wend. 9; U. S. v. Nickerson, 17 How. U. S. 204.

73. S. v. Lamont, 2 Wis. 437; Reg. v. Gardiner, 8 Car. & P. 737; S. v. Chamerlin, 30 Vt. 559; Wilson v. S., 27 Tex. Ap. 47.

74. Ante, § 921; Reg. v. Baker, 1895, 1 Q. B. 797.

75. Ante, § 922.

76. Ante, §§ 911-915, 918; C. v. Knight, 12 Mass. 274, 7 Am. D. 72; Stewart v. S., 6 Tex. Ap. 184.

77. And see S. v. McCollum, 44 Mo. 343; S. v. Union Quarter Sessions, 16 Vroom, 523; S. v. Smith, 3 Wash. 14; S. v. Eald, 55 Wash. 302, 104 P. 275; S. v. Rhodes, 220 Mo. 9, 13, 119 S. W. 391.

78. Hinch v. S., 2 Mo. 158.

79. Allen v. S., 42 Tex. 12; S. v. Perry, 42 Tex. 238; Smith v. S., 1 Tex. Ap. 620.

80. S. v. Morse, 1 Greene (Iowa), 503.

II. *The Evidence.*

§ 927. A Peculiarity—in this offense relates to—
The Number and Corroboration of Witnesses:—

1. **The Doctrine**—is that, since the testimony alleged to be perjured was delivered on oath, such oath as well as that of the contradicting witnesses should be regarded on the trial for the perjury. And where the evidence, thus viewed, presents "only oath against oath," it will be insufficient.[81] Whence it became the old rule that two witnesses, directly contradicting what the defendant testified to, are indispensable to a conviction for perjury.[82] But—

2. **Present Rule.**—Evidently where there is only one witness directly to the alleged falsity of the swearing, there may be something in the case, or brought forward by a witness who cannot speak to the main charge, indicating, with reliable distinctness, which of the two contradictory oaths is false. Hence by the modern rule it is sufficient either that there are two witnesses, or that the testimony of the one witness is corroborated or sustained by other facts appearing in the case or testified to by other witnesses.[83] Negatively,—

§ 928. The Mere Unaided Testimony—of one witness is not sufficient to convict of perjury.[84] But—

81. Reg. v. Muscot, 10 Mod. 192, 194; Fanshaw's Case, Skin. 327.

82. 1 Greenl. Ev. § 257; U. S. v. Wood, 14 Pet. 430, 440; Rex v. Broughton, 2 Stra. 1229.

83. S. v. Blize, 111 Mo. 464, 20 S. W. 210; Meeks v. S., 32 Tex. Cr. 420, 24 S. W. 98; Freeman v. S., 19 Fla. 552; McClerkin v. S., 20 Fla. 879; Gartman v. S., 16 Tex. Ap. 215; P. v. Stone, 32 Hun, 41; Williams v. C., 91 Pa. 493; Maines v. S., 26 Tex. Ap. 14; Wilson v. S., 27 Tex. Ap. 47, 11 Am. St. 180; Gabrielsky v. S., 13 Tex. Ap. 428; S. v. Hawkins, 115 N. C. 712. A part of these cases are on a statute; S. v. Pratt, 21 S. D. 305, 112 N. W. 152; Stamper v. Com., 30 Ky. L. 992, 100 S. W. 286; Carter v. S. (Tex. Cr. Ap. 1898), 43 S. W. 996; Conant v. S., 51 Tex. Cr. Ap. 610, 103 S. W. 897.

84. Peake Ev. Nor. Ed. 20; McNally Ev. 37; Rex v. Broughton, 2 Stra. 1229, 1230; Campney's Case, 2 Lewin, 258; S. v. Heed, 57 Mo. 252; P. v. Davis, 61 Cal. 536; Whittle v. S., 79 Miss. 327, 30 So. 722; Parham v. S., 3 Ga. Ap. 468, 60 S. E. 123; Howell v. Com., 31 Ky. L. 983, 104 S. W. 685.

§ 929. 1. **Only to the Question of Falsity**—does this rule extend.[85] So that what the prisoner swore to on the previous occasion may be proved by one alone;[86] because he then merely testified so and so, he did not swear he so testified, and there is no oath against oath. And—

2. **Subornation of Perjury**—may be proved by one witness; there being no oath of the defendant against it.[87] Hence—

§ 930. **The Rule**—requiring more than one witness is, to repeat, limited to the question of the falsity of what the defendant delivered under oath.[88] Hence also,—

§ 931. **Contradictory Oaths and Declarations.**—Where, on different occasions, the defendant has sworn both in affirmation and denial of the same thing, oath nullifies oath; and the rule that the testimony of one witness will not authorize a conviction does not apply.[89] The further doctrine as to the effect of his contradictory statements, whether made on oath or not, is that in neither case are they alone a sufficient foundation for a conviction for perjury.[90] But the added testimony of an independent witness to the falsity of the one statement is not required

85. MacNally Ev. 37; S. v. Hayward, 1 Nott & McC. 546; S. v. Courtright, 66 Ohio 35, 63 N. E. 590.

86. C. v. Pollard, 12 Met. 225; S. v. Wood, 17 Iowa, 18. Contra, S. v. Howard, 4 McCord, 159. See Reg. v. Roberts, 2 Car. & K. 607; Brooks v. S., 91 Ark. 505, 121 S. W. 740.

87. C. v. Douglass, 5 Met. 241; Bell v. S., 5 Ga. Ap. 701, 63 S. E. 860; S. v. Renswick, 85 Minn. 19, 88 N. W. 22.

88. P. v. Doody, 172 N. Y. 165, 64 N. E. 807; S. v. Waddle, 100 Iowa, 57, 69 N. W. 279; Hambright v. S., 49 Tex. Cr. Ap. 162, 91 S. W. 232; Adams v. S., 49 Tex. Cr. Ap. 361, 91 S. W. 225.

89. 2 Russ. Crimes (3d Eng. Ed.) 651-663, where are collected several cases from which, in combination, the doctrine of the text may be derived; as Rex v. Knill, 5 B. & Ald. 929, note; Reg. v. Wheatland, 8 Car. & P. 238; Jackson's Case, 1 Lewin, 270. That this has not always been held exactly so, see the opinions in Reg. v. Hook, Dears. & B. 606, 8 Cox C. C. 5; S. v. Day, 108 Minn. 121, 121 N. W. 611.

90. New Crim. Law, II, § 1044; Schwartz v. C., 27 Grat. 1025, 1030, 21 Am. R. 365; S. v. Williams, 30 Mo. 364; Reg. v. Owen, 6 Cox, C. C. 105. See S. v. Voght, 27 Iowa, 117; Brown v. S., 18 Ohio St. 496; C. v. Monahan, 9 Gray, 119; P. v. Smith, 3 Cal. Ap. 68, 84 P. 452.

where, as often happens, the truth may be otherwise duly evolved from the combined proven facts.[91] And—

§ 932. 1. **What besides One Witness.**—This view accords with the modern doctrine[92] that a second *witness* is not required to turn the scale against the defendant's former oath; but circumstances or facts otherwise appearing may suffice.[93] For example, independent corroboration[94] of the testifying witness may.[95] So, in the opinion of most courts, may the defendant's declarations contradictory of his former testimony.[96] Nor would it be correct to say that the corroborating or ancillary evidence or circumstances must be of weight equal to the testimony of one witness.[97] There must simply be enough plainly to turn the scale against the defendant's former oath.[98] Where there are several assignments of perjury, this rule must be applied severally to each.[99] Even—

2. **The One Witness**—to the falsity, thus assumed to be necessary, is not always so. This part of the case, the same

91. Reg. v. Hook, supra; U. S. v. Mayer, Deady, 127; U. S. v. Wood, 14 Pet. 430.

92. Ante, § 927.

93. Rex v. Lee, 2 Russ. Crimes (3d Eng. Ed.) 649, 650; S. v. Seaton, 8 Iowa, 138; P. v. Sturgis, 96 N. Y. S. 1046, 110 Ap. Div. 1; S. v. Smalls, 63 Wash. 172, 115 P. 82; Grissom v. S., 88 Ark. 15, 113 S. W. 1011; S. v. Clough, 111 Iowa, 714, 83 N. W. 727.

94. Vol. II, §§ 1169, 1170.

95. Reg. v. Braithwaite, 8 Cox, C. C. 444; Reg. v. Braithwaite, 8 Cox, C. C. 254, 1 Fost. & F. 638; Reg. v. Towey, 8 Cox, C. C. 328; Reg. v. Gardiner, 8 Car. & P. 737; Reg. v. Webster, 1 Fost. & F. 515; S. v. Buie, 43 Tex. 532; Hendricks v. S., 26 Ind. 493; S. v. Raymond, 20 Iowa, 582.

96. S. v. Molier, 1 Dev. 263; Rex v. Mayhew, 6 Car. & P. 315; Reg. v. Hook, Dears. & B. 106, 8 Cox, C. C. 5; Peterson v. S., 74 Ala. 34. See Reg. v. Boulter, 2 Den. C. C. 396, 5 Cox, C. C. 543, 9 Eng. L. & Eq. 537; Reg. v. Owen, 6 Cox, C. C. 105; S. v. Williams, 30 Mo. 364. As to effect of admissions. P. v. Maxwell, 118 Cal. 50, 50 P. 18; S. v. Hunter, 181 Mo. 316, 80 S. W. 955; Butler v. S., 36 Tex. Cr. 483, 38 S. W. 46.

97. Crusen v. S., 10 Ohio St. 258; Hendricks v. S., 26 Ind. 493.

98. C. v. Parker, 2 Cush. 212; Reg. v. Yates, Car. & M. 132; Williams v. Com., 24 Ky. L. 465, 68 S. W. 871; S. v. Hunter, 181 Mo. 316, 80 S. W. 955; S. v. Courtright, 66 Ohio St. 35, 63 N. E. 590; S. v. Rutledge, 37 Wash. 523, 79 P. 1123.

99. Williams v. C., 91 Pa. 493.

as any other, may be made out by documentary and other like evidence.[1]

§ 933. **Court or Jury.**—We have thus been inquiring upon what, in matter of law, the court will permit the jury to act. As in other cases, so in these, when it has suffered evidence to be laid before them, and has pronounced it legally sufficient, their duty begins. They are not to convict simply because the law permits them to. Into their deliberations should enter all the proven facts, and the evidence as tending to prove this or that, including the fact of the defendant's oath to what is now charged as false. And they are to convict him if, and only if, they are satisfied beyond a reasonable doubt of the falsity of the former oath, together with the other elements which make its falsity perjury.

§ 933 a. *Other Questions of Evidence*:—

1. **As a Witness,**—the party to the suit wherein was committed the perjury is, in general, competent for or against the defendant. But in special circumstances, he has been rejected. The rules governing this sort of question are elsewhere considered.[2]

2. **Judge.**—If the trial was in a superior court, the judge who presided ought not to be called;[3] nor are his notes, though produced by his clerk, evidence.[4]

§ 933 b. 1. **The Cause and Issue**—wherein was committed the perjury are proved by the record, which should be in the form and with the verification required by the ordinary practice of the court.[5] How much of the record and whether any and what, accompanying papers must

1. U. S. v. Wood, 14 Pet. 430. See Hendricks v. S., 26 Ind. 493.

2. Vol. II, §§ 1136-1138; Reg. v. Keat, 2 Moody, 24; Rex v. De Faria, Peake, 104; Reg. v. Yates, Car. & M. 132; Rex v. Boston, 4 East, 572, 1 Smith, 202; Rex v. Dalby, Peake, 12; Fanshaw's Case, Skin. 327; Rex v. Pepys, Peake, 138; C. v. Hart, 2 Rob. Va. 819; S. v. Bishop, 1 D. Chip. 120; Rex v. Eden, 1 Esp. 97; Rex v. Hulme, 7 Car. & P. 8.

3. Vol. II, § 1145; Reg. v. Gazard, 8 Car. & P. 595; Reg. v. Harvey, 8 Cox, C. C. 99, 103.

4. Reg. v. Child, 5 Cox, C. C. 197, 203. See Reg. v. Britton, 17 Cox, C. C. 627.

5. Reg. v. Gordon, Car. & M. 410; Rex v. Sykes, T. Raym. 202; Reg. v. Newman, 2 Den. C. C. 390, 5 Cox, C. C. 547, 3 Car. & K. 240, 9 Eng. L. & Eq. 529; Reg. v. Turner, 2 Car. & K. 732; Reg. v. Carter, 6

be produced,[6] and whether there should be any and what extra-record proof of official character,[7] will vary with the circumstances and cases, according to familiar principles not for consideration here. And there should be no fatal variance between the allegations and the produced record.[8] It is not fatal for the former to say that an issue was joined, and for more issues than one to appear in the latter.[9] To the record thus in evidence [10] should be added such parol showing of what was done at the trial as the exigencies of the particular issue require.[11]

2. **Circumstantial and other not Direct Evidence**—and presumptions are competent within the familiar rules.[12]

Mod. 167; Porter v. Cooper, 6 Car. & P. 354; Reg. v. Scott, 2 Q. B. D. 415; Rex v. Browne, 3 Car. & P. 572; Kitchen v. S., 26 Tex. Ap. 165; Heflin v. S., 88 Ga. 151, 30 Am. St. 147, 14 S. E. 112; S. v. Horine, 70 Kan. 256, 78 P. 411; Martinez v. S., 39 Tex. Cr. 479, 46 S. W. 826; Ross v. S., 40 Tex. Cr. 349, 50 S. W. 336.

6. Reg. v. Newman, supra; Rex v. Browne, supra; Reg. v. Newall, 6 Cox C. C. 21; Reg. v. Whybrow, 8 Cox C. C. 438; Reg. v. Hurrell, 3 Fost. & F. 271; S. v. Alexander, 2 Dev. 470; Respublica v. Goss, 2 Yeates, 479; Rex v. Laycock, 4 Car. & P. 326; Reg. v. Mason, 29 U. C. Q. B. 431; Reg. v. Goodfellow, Car. & M. 569; Reg. v. Hudson, 1 Fost. & F. 56; Reg. v. Shaw, Leigh, & C. 579, 10 Cox C. C. 66; Reg. v. Carr, 10 Cox C. C. 564; Wilkinson v. S., 226 Ill. 135, 80 N. E. 699.

7. Reg. v. Turner, supra; Reg. v. Child, 5 Cox C. C. 197, 205; Reg. v. Johnson (Law Rep.), 2 C. C. 15, 12 Cox, C. C. 264, 4 Eng. Rep. 540; S. v. Nickerson, 46 Iowa, 447; Reg. v. Smith (Law Rep.) 1 C. C. 110, 11 Cox C. C. 10; S. v. Hascall, 6 N. H. 352; Lambert v. P., 76 N. Y. 220, 32 Am. R. 293; Reg. v. Lewis, 12 Cox C. C. 163, 2 Eng. Rep. 216; Reg. v. Willis, 12 Cox C. C. 164, 2 Eng. Rep. 218.

8. Ante, § 911 (4); S. v. Harvell, 4 Jones, N. C. 55; Reg. v. Dunn, 1 Car. & K. 730; S. v. Green, 100 N. C. 419, 5 S. E. 422.

9. Reg. v. Smith, 1 Fost. & F. 98; Rex v. Jones, Peake, 37.

10. **Admission Instead of Proof.** In a case before Lord Abinger, C. B. the respective attorneys had agreed before trial that by admission the formal proofs should be dispensed with. The defendant's counsel declined making any admission; and the learned judge declared that none could be accepted unless "made at the trial by the defendant or his counsel." Reg. v. Thornhill, 8 Car. & P. 575.

11. Reg. v. Child, 5 Cox C. C. 197, 203; Reg. v. Harrison, 9 Cox C. C. 503.

12. Beach v. S., 32 Tex. Cr. 240, 22 S. W. 976; C. v. Hollis, 140 Mass. 436, 5 N. E. 855; S. v. Mace, 86 N. C. 668; Heflin v. S., 88 Ga. 151, 30 Am. St. 147, 14 S. E. 112; Baker v. S., 87 Ark. 564, 113 S. W. 205.

§ 933 c. **Oath.**—On a charge of perjury in a trial in court, any one who was present can testify to the oath, the same as to the other proceedings.[13] Or, whether it was in court or elsewhere, the official person before whom it was taken may be a witness to it.[14] Or, if it was to an answer in chancery or other affidavit out of court, the authorized officer's certificate thereof, with proof of his signature (to which may be added that of the affiant's, if he signed it), will, *prima facie*, suffice.[15] The jurat will thus show the county also, if it is written therein.[16]

§ 934. 1. **Where there are Several Assignments**—of perjury,[17] proof of any sufficient one will sustain the court.[18]

2. **How prove.**—If the perjury was in oral testimony, any one who heard it, and who has sufficient memory of it, whether assisted or not by minutes or other memoranda, may relate its substance.[19] Not all, but all the material

13. Rex v. Canning, 19 How. St. Tr. 283, 323; Keator v. P., 32 Mich. 484. See Reg. v. Tew, Dears. 429, 29 Eng. L. & Eq. 537; Rex v. Rowley, Ryan & Moody, N. P. 299; Rex v. McCarther, Peake, 155; Rex v. Brady, 1 Leach, 327; Markey v. S., 47 Fla. 38, 37 So. 53; see Trevino v. S., 48 Tex. Cr. 350, 88 S. W. 356.

14. S. v. Hascall, 6 N. H. 352; Case v. P., 76 N. Y. 242.

15. C. v. Warden, 11 Met. 406, 409; Rex v. Spencer, Ryan & Moody, N. P. 97, 1 Car. & P. 260; Rex v. Benson, 2 Camp. 508; Rex v. Morris, 2 Bur. 1189, 1 Leach, 50. And see C. v. Kimball, 108 Mass. 473; Rex v. Howard, 1 Moody & R. 187. Greenleaf says: "If the affidavit were actually used by the prisoner, in the cause in which it was taken, proof of this fact will supersede the necessity of proving his handwriting. Rex v. James, 1 Show. 397, Carth, 220. It was Carthew's report of this case which was denied by Lord Mansfield in Crook v. Dowling, 3 Doug. 75; it not appearing that the affidavit, of which a copy only was offered, had been used by the prisoner. And see Rees v. Bowen, McClel. & Y. 383." 3 Greenl. Ev. § 192.

16. Rex v. Spencer, supra; Van Dusen v. P., 78 Ill. 645. And see Reg. v. Turner, 2 Car. & K. 732; Rex v. Emden, 9 East, 437.

17. C. v. Johns, 6 Gray, 274; S. v. Bishop, 1 D. Chip. 120; S. v. Thomas (Del. 1910), 78 A. 640.

18. Reg. v. Rhodes, 2 Ld. Raym. 886; S. v. Hascall, 6 N. H. 352; Harris v. P., 64 N. Y. 148; S. v. Blaisdell, 59 N. H. 328; Bradford v. S., 134 Ala. 147, 32 So. 742; S. v. Smith, 84 Kan. 646, 114 P. 1074; S. v. Smalls, 63 Wash. 172, 115 P. 82; S. v. Taylor, 202 Mo. 1, 100 S. W. 41; Hereford v. P., 197 Ill. 222, 64 N. E. 310; S. v. Day, 100 Mo. 242, 12 S. W. 365; S. v. Gordon, 196 Mo. 185, 95 S. W. 420.

19. Reg. v. Morgan, 6 Cox C. C. 107; P. v. Curtis, 50 Cal. 95; Rex v.

parts, should in the first instance be sworn to on behalf of the prosecution,—a rule the precise limits of which appear not to be held exactly alike by all judges.[20] Where the perjury was in writing, or a writing was so referred to as to become material, it must be produced, or its absence accounted for, according to the ordinary rules.[21] Then the falsity must be shown by competent evidence, in terms sufficiently broad and full.[22] And there should be no variance between allegation and proof.[23]

§ 935. 1. **The Allegation of Materiality**—must also be proved.[24] It is not enough that the testimony was actually admitted.[25] Yet it suffices that the indictment sets out facts whence the materiality judicially appears.[26] Where

Munton, 3 Car. & P. 498; Taylor v. S., 48 Ala. 157; Reg. v. Harvey, 8 Cox C. C. 99, 103; Barnett v. S., 89 Ala. 165, 7 So. 414; Sisk v. S., 28 Tex. Ap. 432; Leaptrot v. S., 51 Fla. 57, 40 So. 616; S. v. Woolridge, 45 Ore. 389, 78 P. 333; Simpson v. S., 46 Tex. Cr. 77, 79 S. W. 530. See Hemphill v. S., 71 Miss. 877, 16 So. 261.

20. Rex v. Rowley, Ryan & Moody, N. P. 299; Rex v. Jones, Peake, 37; Rex v. Dowlin, Peake, 170; Dodge v. S., 4 Zab. 455; 3 Russ. Crimes (5th Eng. Ed.) 82-84; Gandy v. S., 23 Neb. 436; S. v. Frisby, 90 Mo. 530; Wilkinson v. P., 226 Ill. 135, 80 N. E. 699.

21. Rex v. Wylde, 6 Car. & P. 380; Osburn v. S., 7 Ohio, 1st pt. 212; Rex v. Hailey, 1 Car. & P. 258; Reg. v. Elsworthy (Law Rep.), 1 C. C. 103, 10 Cox C. C. 579; Reg. v. Cox, 4 Fost. & F. 42; Reg. v. Milnes, 2 Fost. & F. 10; Reg. v. Dillon, 14 Cox C. C. 4. And see Reg. v. Newton, 1 Car. & K. 469.

22. Rex v. Tucker, 2 Car. & P. 500; Reg. v. Parker, Car. & M. 639; Pollard v. P., 69 Ill. 148; C. v. Butland, 119 Mass. 317; Reg. v. Hall, 8 Car. & P. 358.

23. Roberts v. P., 99 Ill. 275; C. v. Sargent, 129 Mass. 115.

24. S. v. Kennerly, 10 Rich. 152; S. v. Aikens, 32 Iowa, 403; Wood v. P., 59 N. Y. 117; Nelson v. S., 32 Ark. 192; Reg. v. Lewis, 12 Cox C. C. 163, 2 Eng. Rep. 216; Reg. v. Willis, 12 Cox C. C. 164, 2 Eng. Rep. 218; S. v. Bailey, 34 Mo. 350; Wilkinson v. P., 226 Ill. 135, 80 N. E. 699; S. v. Dineen, 203 Mo. 628, 102 S. W. 480; S. v. Wiggins, (Miss.) 30 So. 712. If there is no dispute as to the testimony its materiality is for the court. Grissom v. S., 88 Ark. 115, 113 S. W. 1011; Saucier v. S., 95 Miss. 226, 48 So. 840; S. v. Moran, 216 Mo. 550, 115 S. W. 1126; P. v. Corrigan, 195 N. Y. 1, 87 N. E. 792.

25. C. v. Pollard, 12 Met. 225; Lawrence v. S., 2 Tex. Ap. 479; Young v. S., 55 Tex. Cr. Ap. 383, 116 S. W. 1158.

26. Ante, § 921.

it does not, the course is to prove all,[27] or so much less than all of the pleadings and evidence brought forward at the former trial as will duly present the question; whereupon the court, not the jury, will decide, as of law, whether or not what the defendant is shown to have testified to therein was material.[28] Yet practically, as fact is involved with the law, the question must generally be passed on with the rest by the jury, under instructions from the court.[29] In like manner,—

2. **The Jurisdiction**—of the court wherein was the perjury, while it must be alleged,[30] must appear equally in the proofs;[31] though evidently, in most cases, this is a conclusion which the court will deduce as of law from the facts appearing of record and otherwise.[32]

§ 935 a. That the False Testimony was Wilful and Corrupt—is one of the elements of perjury.[33] Doubtless the jury may often infer this element from the evidence already detailed. A mere want of motive or interest to swear falsely is not sufficient ground for resisting this inference.[34] Neither is it sufficient foundation for the inference, that the testimony of the defendant and of other witnesses at the former trial was in conflict regarding the terms of a contract.[35] Pertinent[36] against the defendant is such evidence as his expressions of malice toward the person injured,[37] or a pending reward which his testimony was adapted to secure.[38] In his favor may be shown, under proper cir-

27. Reg. v. Harrison, 9 Cox C. C. 503; Rex v. Dowlin, Peake, 170.

28. Steinman v. McWilliams, 6 Pa. 170; S. v. Williams, 30 Mo. 364; Smith v. S., 27 Tex Ap. 50.

29. Lawrence v. S., 2 Tex. Ap. 479, 484.

30. Ante, §§ 905, 910a; By record. S. v. Brown, 111 La. 170, 35 So. 501.

31. Wilson v. S., 27 Tex. Ap. 47, 11 Am. St. 180. Compare with S. v. Peters, 107 N. C. 876, 12 S. E. 74. And see S. v. Ridley, 114 N. C. 827, 19 S. E. 149.

32. See, for illustration, Exum v. S., 90 Tenn. 501, 25 Am. St. 700, 17 S. W. 107.

33. Ante, § 922; New Crim. Law, II, §§ 1045-1048; Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547, 12 Det. Leg. N. 860; S. v. Smith, 47 Ore. 485, 83 P. 865; Wilkinson v. P., 226 Ill. 135, 80 N. E. 699.

34. Schaller v. S., 14 Mo. 502.

35. Bell v. Senneff, 83 Ill. 122.

36. 3 Greenl. Ev. §§ 198-200.

37. Rex v. Munton, 3 Car. & P. 498.

38. C. v. Brady, 7 Gray, 320.

cumstances and with proper qualifications, not always and as of course, his intoxication,[39] his inability to read in a case relating to a written contract,[40] his reluctance to appear as a witness,[41] his former story when of the *res gestae*,[42] or a consultation with and advice from legal counsel.[43] These are but illustrations.[44]

III. *Questions of Practice.*

§ 936. **Joinder of Defendants.**—That there can be two or more joint defendants in perjury appears to have been denied.[45] And plainly, if two witnesses, on the trial of one cause, commit separate perjuries, their indictments must be separate. But should two join in one false affidavit, in reason they could be jointly indicted. And there may be other cases within the same principle;[46] as, where one delivers false testimony orally at the instigation of another.

§ 937. **Verdict.**—"Guilty of perjury before A and T" is a fatal variance on an averment of perjury before A.[47] So, where the charge was that the defendant falsely denied on oath the execution of a particular deed, a finding of guilty of denying its signature is ill; since a deed may be executed without signing,[48] "as where one person signs another's name by direction, and a sealing and delivery take place by the party whose name is so written."[49]

39. Lytle v. S., 31 Ohio St. 196; Bowden v. P., 12 Hun, 85. See Sisk v. S., 28 Tex. Ap. 432; Or insanity S. v. Coyne, 214 Mo. 344, 114 S. W 8.

40. Flemister v. S., 48 Ga. 170; Davis v. S., 7 Ga. Ap. 180, 67 S. E. 839.

41. C. v. Brady, 7 Gray, 320.

42. S. v. Curtis, 12 Ire. 270.

43. S. v. McKinney, 42 Iowa, 205.

44. **Other Questions of Evidence.** Elder v. S., 52 Ga. 581; Rex v. Mead, 2 B. & C. 605; C. v. McLaughlin, 122 Mass. 449; Winn v. Peckham, 42 Wis. 493; Reg. v. Turner, 2 Car. & K. 732; Barnes v. S., 15 Ohio Cir. Ct. R. 14.

45. Rex v. Philips, 2 Stra. 921.

46. Kitchen v. S., 26 Tex. Ap. 165; Barre v. S. (Ark 1911), 139 S. W. 641.

47. S. v. Mayson, 3 Brev. 284.

48. 1 Bishop Con. § 112.

49. S. v. Avera, N. C. Term, 237.

IV. *Attempts.*

§ 938. **Subornation of Perjury,**—to be treated of in a separate chapter, is, at common law, a mere executed attempt; in other words, it is a particular form of perjury.[50] But—

§ 939. **An Unsuccessful Subornation**—is an indictable attempt.[51] And there are other forms of the attempt.[52] Yet our chapter on Attempt[53] renders needless any further exposition here of the subject.

50. New Crim. Law, II, §§ 1056, 1197; C. v. Smith, 11 Allen, 243.

51. New Crim. Law, II, §§ 1056 (1), 1197 (3); S. v. Schaffner, 6 Pen. (Del.) 576, 69 A. 1004.

52. Ib. § 1055.

53. Ante, § 71 et seq.

For Petit Larceny, see Larceny; Piracy, see New Crim. Law, II, §§ 1057-1063; Dir. & F., §§ 878, 879; Polygamy, see Stat. Crimes; Dir. & F., §§ 880-883; Postal Offenses, see Dir. & F., §§ 884-888.

CHAPTER CXLVI.

PRISON BREACH, RESCUE, AND ESCAPE.

Consult—for the law of these offenses, New Crim. Law, II, §§ 1064-1106. For the indictment and related questions, Dir. & F., §§ 889-898. For miscellaneous questions see the indexes to this series of books.

§ 940. 1. **The Distinctions in the Procedure**—for these related offences do not depend on the name of the offense, but upon whether the criminal act proceeds from the officer having a prisoner in custody, from the prisoner, or from a third person. Therefore—

2. **How Chapter divided.**—We shall consider, I. Escapes suffered by the Officer; II. Prison Breaches and Escapes by the Prisoner; III. Rescues and Helps to escape from Third Persons.

I. *Escapes suffered by the Officer.*

§ 941. 1. **Malfeasance.**—This is a species of malfeasance in office,[54] the procedure for which has been already considered.[55]

2. **The Indictment**—will somewhat vary with the sort of escape, the authority under which the prisoner was held; and, if on a statute, the statutory terms.[56] In general, it sets out the official character of the defendant, his custody

54. Hatch v. S., 10 Tex. Ap. 515.

55. Ante, §§ 822-836.

56. For forms, see Dir. & F., §§ 890, 895-897; 2 Chit. Crim. Law, 172 et seq.; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 550, 551, 19th Ed. 852; Rex v. Glover, Trem. P. C. 244; Rex v. Manlove, Trem. P. C. 246; Kavanaugh v. S., 41 Ala. 399; S. v. Hollon, 22 Kan. 580. See Shattuck v. S., 51 Miss. 575, 581.

of a prisoner named; and so much (differing with the circumstances) of the cause of the detention or authority therefor as will show the defendant's duty in the premises and the nature of the offense of violating it; and then, in a case, for example, of negligent escape, it charges that the defendant then and there being under such duty, "unlawfully and negligently did permit" the prisoner "to escape and go at large withersoever he would, whereby the said" prisoner " did then and there escape and go at large whithersoever he would."[57]

§ 942. **The Evidence**—will consist of proofs of the foregoing allegations. If, for example, the custody was under a warrant, it should be produced or its absence accounted for, according to ordinary rules.[58] "It is not necessary," says Archbold, "to prove negligence in the defendant; the

57. Archb. Crim. Pl. & Ev. (19th Ed.) 852, 853. And see and compare S. v. Hedrick, 35 Tex. 485; Weaver v. C., 29 Pa. 445; C. v. Connell, 3 Grat. 587; S. v. Beebe, 13 Kan. 589, 19 Am. R. 93; Bouche's Case, Cro. Eliz. 290; Martin v. S., 32 Ark. 124; S. v. Baldwin, 80 N. C. 390; Barthelow v. S., 26 Tex. 175; Clemons v. S., 4 Lea, 23. In 1 Russ. Crimes (3d Eng. Ed.) 422, 423, it is said that "every indictment for an escape, whether negligent or voluntary, must expressly show that the party was actually in the defendant's custody for some crime, or upon some commitment upon suspicion. 2 Hawk. P. C. c. 19. And judgment was arrested upon an indictment which stated that the prisoner was in the defendant's custody, and charged him with a certain crime, but did not state that he was committed for that crime; for a person in custody may be charged with a crime and yet not be in custody by reason of such charge. Rex v. Fell, 1 Ld. Raym. 424, 1 Salk. 272. See Weaver v. C., supra. But where a person was committed to the custody of a constable by a watchman, as a loose and disorderly woman and a street-walker, it was holden, upon an indictment against the constable for discharging her, that by an allegation of his being charged with her 'so being such loose,' etc., it was sufficiently averred that he was charged with her 'as such loose,' etc., and it was also holden not to be necessary to aver that the defendant knew the woman to be a street-walker. Rex v. Bootie, 2 Bur. 864; s. c. nom. Rex v. Booty, 2 Keny. 575; and see, as to the sufficiency of such averments, Rex v. Boyall, 2 Bur. 832. And every indictment should also show that the prisoner went at large. 2 Hawk. P. C. c. 19, § 14, where it is said that this is most perfectly expressed by the words exivit ad largum."

58. Archb. ut sup., referring to 2 Hawk. P. C. c. 19, § 14.

law implies it;[59] but if the escape were not in fact negligent, if the defendant by force rescued himself, or were rescued by others, and the defendant made fresh suit after him but without effect, all this must be shown upon the part of the defendant.''[60]

II. *Prison Breaches and Escapes by the Prisoner.*

§ 943. **The Indictment**—will in detail vary with the form of the offense; and, if statutory, the particular terms of the statute; and with the special facts. But it must contain such a setting out that the custody under which the defendant was held and its lawfulness will appear, on its face showing the escaping or breaking away to be a crime. It may then charge that then and there the defendant, so being in the lawful custody of, etc., ''out of, etc., unlawfully did escape and go at large whithersoever he would;'' or it may charge the breaking of the prison, etc.[61]

§ 944. **The Evidence**—will consist of proofs of these averments.[62] Among such proofs, may be the records of the committing magistrate, the processes under which the defendant was held, the judgment and records of the superior court, and the like.[63] It will not avail him that he was afterward acquitted of the offense for which he was in custody.[64]

59. Referring to 1 Hale P. C. 600 et seq. And see Blue v. C., 4 Watts, 215; Shattuck v. S., 51 Miss. 575.

60. Archb. Crim. Pl. & Ev. (19th Ed.) 853. For a "wilfull" escape, the rule is otherwise. Barthelow v. S., 26 Tex. 175.

61. Archb. Crim. Pl. & Ev. (19th Ed.) 853-855; 2 Chit. Crim. Law, 158 et seq.; Dir. & F., §§ 890-892; S. v. Murphy, 5 Eng. 74; Hart's Case, Cro. Jac. 472, 473; Rex v. Fitzpatrick, Russ. & Ry. 512; Ex parte Ah Bau, 10 Nev. 264; S. v. Doud. 7 Conn. 384; Rex v. Treadwell, 1 Russ. Crimes, (5th Eng. Ed.) 604; Sanford v. S., 6 Eng. 328; S. v. Whalen, 98 Mo. 222, 11 S. W. 576.

62. Rex v. Smith, 1 Russ. Crimes (5th Eng. Ed.) 567; Gillian v. S., 3 Tex. Ap. 132; S. v. Murphy, 5 Eng. 74; Sanford v. S., 6 Eng. 328; Fanning v. S., 14 Mo. 386.

63. S. v. Whalen, 98 Mo. 222, 11 S. W. 576; P. v. Johnson, 46 Hun, 667; Hudgens v. C., 2 Duv. 239.

64. S. v. Lewis, 19 Kan. 260, 27 Am. R. 113.

III. *Rescues and Helps to escape from Third Persons.*

§ 945. 1. **The Indictment**—sets out the custody and its lawfulness, as already described;[65] the defendant's knowledge thereof;[66] the act of assistance, or of rescue, or the conveying of implements for escape to the prisoner; and, if on a statue, it covers the statutory terms. The fulness required will vary with the class of the offense and its circumstances.[67]

2. **On a Statute**—which forbids the "conveying" of a thing to one imprisoned to aid his escape, an allegation that the defendant "furnished" it will not suffice.[68]

§ 946. **Some Questions of Practice and Evidence**—have arisen, not requiring special elucidation.[69]

65. S. v. Jones, 78 N. C. 420; S. v. Dunn, 1 Dutcher, 114; Anonymous, March, 67, pl. 105; S. v. Hilton, 26 Mo. 199; C. v. Morihan, 4 Allen, 585; Gunyon v. S., 68 Ind. 79.

66. Rex v. Young, 1 Russ. Crimes (5th Eng. Ed.) 589, note.

67. 2 Chit. Crim. Law, 166-171; Archb. Crim. Pl. & Ev. (19th Ed.) 858; Rex v. Tilley, 2 Leach, 662; Holloway v. Reg., 17 Q. B. 317, 2 Den. C. C. 287; Reg. v. Holloway, 5 Eng. L. & Eq. 310; S. v. Addock, 65 Mo. 590; Clayton v. S., 4 Tex. Ap. 515; Rex v. Freeman, 2 Stra. 1226; Rex v. Burridge, 3 P. Wms. 439; Oleson v. S., 20 Wis. 58; Ramsey v. S., 43 Ala. 404; Baker v. S., 15 Ga. 498; Wilson v. S., 61 Ala. 151; C. v. Malloy, 119 Mass. 347; C. v. Filburn, 119 Mass. 297; Kyle v. S., 10 Ala. 236; Hurst v. S., 79 Ala. 55; P. v. Murray, 57 Mich. 396, 24 N. W. 118; Vaughan v. S., 9 Tex. Ap. 563; Brunson v. S., 97 Ind. 95.

68. Francis v. S., 21 Tex. 280. See Hurst v. S., 86 Ala. 604, 11 Am. St. 79, 6 So. 120; Mason v. S., 7 Tex. Ap. 623; Broxton v. S., 9 Tex. Ap. 97.

69. Habersham v. S., 56 Ga. 61; Rex v. Philips, Barnes (3d Ed.) 429; Rex v. Belt, 2 Salk. 586; Peeler v. S., 3 Tex. Ap. 533; Rose v. S., 33 Ind. 167; Crowder v. S., 56 Ga. 44; Perry v. S., 63 Ga. 402; Murray v. S., 25 Fla. 528, 6 So. 498; Butler v. S., 7 Tex. Ap. 635.

For Prize Fighting, see Dir. & F., §§ 899-902. And see the indexes to this series of books; Profane Swearing, see Blasphemy and Profaneness; Public Meetings, see Disturbing Meetings; Public Way, see Way.

CHAPTER CXLVII.

RAPE.

Consult—for the law of this offense, New Crim. Law, II, §§ 1107-1136; Stat. Crimes, §§ 478-499. For the indictment, with incidental questions, Dir. & F., §§ 903-914. And see the indexes to this series of books.

§ 947. 1. **This Chapter,**—in the main, extends only to rape proper, the carnal abuse of girls below the age of consent being treated of in "Statutory Crimes." Yet the latter is not unfrequently in our books, even in our statutes, called rape.[70]

2. **How Chapter divided.**—We shall consider, I. The Indictment; II. The Evidence; III. Questions of Practice; IV. Attempts.

I. *The Indictment.*

§ 948. **How far Statutory.**—Since all felonious rape is in England statutory, and with us is a common law felony only by reason of our having received the early English Statutes as parts of our common law,[71] our indictment is in the main regarded as drawn on the statutes; and we shall

70. Stat Crimes, §§ 484, 485; P. v. Glover, 71 Mich. 303, 38 N. W. 874; S. v. Lacey, 111 Mo. 513, 20 S. W. 238; S. v. Houx, 109 Mo. 654, 32 Am. St. 686, 19 S. W. 35; S. v. Wilcox, 111 Mo. 569, 20 S. W. 314; Mayo v. S., 7 Tex. Ap. 342; McGuff v. S., 88 Ala. 147, 16 Am. St. 25, 7 So. 35; Fry v. C., 82 Va. 334; S. v. Haddon, 49 S. C. 308, 27 S. E. 194; S. v. Gibson, 64 Wash. 131, 116 P. 872.

71. New Crim. Law, II, §§ 1108-1115, 1134.

here, to some extent, take into view our American enactments.

§ 949. **The Common Form of Indictment**—is, as to its principal allegations, that on, etc., at, etc., the defendant "in and upon one X violently and feloniously did make an assault, and her the said X then and there violently and *against her will* [72] feloniously did ravish and carnally know." [73]

§ 950. **"Against the Form of the Statute"**—concludes the indictment commonly in England.[74] And Hale,[75] doubted by Chitty,[76] appears to deem this conclusion necessary. The statute is Westm. 2 (13 Edw. 1), c. 34, A. D. 1285. With us, it is common law; [77] therefore, in principle, this conclusion is not necessary in our States, however deemed in England.[78] Still, if inserted without occasion, it may be rejected as surplusage.[79]

§ 951. **"Against her Will"—("Without her Consent").**—The words of the statute of Westm. 2, and of the amended modern definition of rape, are, as explained in "New Criminal Law," not "against her will," but "where she did not consent." [80] Yet the former is the more common expression in our American statutes; [81] and it appears to have been always, in all our States, and in England, employed in the

72. Query, "without her consent." See post, § 951.

73. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 480, 19th Ed. 762; Dir. & F., §§ 904, 905; S. v. Farmer, 4 Ire. 224; C. v. Scannel, 11 Cush. 547; S. v. Williams, 32 La. Ann. 335, 36 Am. R. 272; P. v. Pacheco, 70 Cal. 473, 11 P. 761; C. v. Kennedy, 131 Mass. 584; Williams v. S., 1 Tex. Ap. 90, 28 Am. R. 399; Gibson v. S., 17 Tex. Ap. 574. And see O'Connell v. S., 6 Minn. 279; Leoni v. S., 44 Ala. 110; Strader v. S., 92 Ind. 376.

74. Archb. ut sup.; 3 Chit. Crim. Law, 815.

75. 1 Hale P. C. 637, 638.

76. 3 Chit. Crim. Law, 812, 815, note.

77. New Crim. Law, §§ 1111, 1115, 1134.

78. And see O'Connell v. S., 6 Minn. 279, 285.

79. Vol. II, § 601. As to the conclusion in North Carolina, see S. v. Storkey, 63 N. C. 7.

80. New Crim. Law, II §§ 1111, 1115.

81. Stat. Crimes, § 482; S. v. Marsh, 132 N. C. 1000, 43 S. E. 838, 67 L. R. A. 179; S. v. Powell, 106 N. C. 635, 11 S. E. 191.

indictment. Its sufficiency cannot be doubted, even where the other expression indicates the exact law. It is a permissible substitute.[82]

§ 952. **Averment of Sex.**—Though rape can be committed only by a male person arrived at puberty, and the victim must be a female,[83]—and though the statute of Westm. 2 has the words "man" and "woman," and our American statutes are in like terms,—it is not necessary to aver, in any case, either that the defendant is a man or that the victim is a woman.[84] This is sometimes explained by saying that the court will recognize the sex by the names and the pronouns.[85] But this result is believed to follow equally and more properly from the general doctrine that neither the defendant's capacity to commit a crime nor the injured person's to be the victim of it need ever be alleged, a charge of its actual commission covering the whole ground and being always sufficient.[86]

§ 953. "**Ravish**"—is indispensable [86a] in the common

82. Vol. II, § 612; S. v. Jackson, 46 La. Ann. 547. And see S. v. Jim, 1 Dev. 142; Harman v. C., 12 S. & R. 69; Williams v. S., 1 Tex. Ap. 90, 28 Am. R. 399; S. v. Peyton, 93 Ark. 406, 125 S. W. 416; P. v. Sykes, 10 Cal. Ap. 67, 101 P. 20.

Not Necessary—in Alabama is the allegation "against her will." Leoni v. S., 44 Ala. 110.

83. New Crim. Law, II, 1111, 1113 (2), 1115-1118; S. v. Williamson, 22 Utah, 248, 62 P. 1022.

84. Warner v. S., 54 Ark. 660, 17 S. W. 6; S. v. Warner, 74 Mo. 83; Greenlee v. S., 4 Tex. Ap. 345; Word v. S., 12 Tex. Ap. 174; Hill v. S., 3 Heisk. 317; S. v. Armstrong, 167 Mo. 257, 66 S. W. 961; S. v. Barrick, 60 W. Va. 576, 55 S. E. 652.

85. Taylor v. C., 20 Grat. 825; Hill v. S., 3 Heisk. 317; Battle v. S., 4 Tex. Ap. 595, 30 Am. R. 169; S. v. Hussey, 7 Iowa, 409; S. v. Farmer, 4 Ire. 224; S. v. Hammond, 77 Mo. 157. And see C. v. Bennet, 2 Va. Cas. 235; Harmon v. C., 12 S. & R. 69. Sometimes the statutory "man," "woman," "female," or the like, is employed, and the courts incline to recommend it. Taylor v. C., supra; Mills v. S., 52 Ind. 187; O'Connell v. S., 6 Minn. 279; Robertson v. S., 31 Tex. 36; Battle v. S., supra; Barker v. S., 40 Fla. 178, 24 So. 69; S. v. Armstrong, 167 Mo. 257. 66 S. W. 961.

86. Vol. II, §§ 521, 522, 615; ante, §§ 199, 00, 669; post, § 954, and other places.

86a. The statutes do not require it. Wilkey v. C., 104 Ky. 325, 20 Ky. L. 578, 47 S. W. 219; S. v. Hayes, 17 S. D. 128, 95 N. W. 296; Tway v. S., 7 Wyo. 79, 50 P. 188.

law indictment, because in the statute of Westm. 2,—"if a man from henceforth do ravish a woman."[87]

§ 954 1. **Age of Female.**—Though it is a separate offense, yet sometimes called rape,[88] to have carnal knowledge of a consenting girl under ten years of age;[89] still it is rape proper to force her, the same as though she were over ten.[90] Therefore the indictment for rape need not state her age or that it was more than ten years. Nor need the age be proved.[91] So,—

2. **Age of Male.**—Though a boy under fourteen is in law incapable of committing rape,[92] no allegation of the age is required;[93] since, as we have seen,[94] the charge against one of having committed a crime includes that of his capacity therefor.

§ 955. "**Assault.**"—Though the common form sets out in terms an assault,[95] this word is not in the old statutes which constitute our common law.[96] Hence it is not necessary in the indictment;[97] while yet, for practical reasons, it should be retained. Again,—

87. Stat. Crimes (1st Ed.) § 489; Davis v. S., 42 Tex. 226; Gougleman v. P., 3 Par. Cr. 15. See Williams v. S., 1 Tex. Ap. 90, 28 Am. R. 399; S. v. Smith, Phillips, N. C. 302; Gibson v. S., 17 Tex. Ap. 574; Elschlep v. S., 11 Tex. Ap. 301; "ravish" defined, S. v. Peyton, 93 Ark. 406, 125 N. W. 416; S. v. Marsh, 132 N. C. 1000, 43 S. E. 828.

88. Ante, § 947 (1); Williams v. S., 47 Miss. 609; Davis v. S., 42 Tex. 226; Greer v. S., 50 Ind. 267, 19 Am. R. 709. See Singer v. P., 13 Hun, 418; Gosha v. S., 56 Ga. 36.

89. New Crim. Law, II, § 1133; Contra, P. v. Miles, 9 Cal. Ap. 312, 101 P. 525.

90. New Crim. Law, II, § 1118.

91. Stat. Crimes, § 482; Hill v. S., 3 Heisk. 317; Mobley v. S., 46 Miss. 501; Davis v. S., supra; Vasser v. S., 55 Ala. 264; S. v. Farmer, Ire. 224; S. v. Storkey, 63 N. C. 7. Except on the question of how mush force was used, S. v. Haddon, 49 S. C. 308, 27 S. E. 194.

92. New Crim. Law, II, §§ 1116, 1117.

93. Stat. Crimes, § 482; C. v. Scannel, 11 Cush. 547; P. v. Ah Yek, 29 Cal. 575; Davis v. S., 42 Tex. 226; Cheek v. S., 171 Ind. 98, 85 N. E. 779; but see Schramm v. P., 220 Ill. 16, 77 N. E. 117.

94. Ante, § 952.

95. Ante, § 949.

96. New Crim Law, II, §§ 1109-1112.

97. Reg. v. Allen, 2 Moody, 179, 9 Car. & P. 521; s. p. O'Connell v. S, 6 Minn. 279, 285. See Elschlep v. S., 11 Tex. Ap. 301.

§ 956. **Not Married.**—A man cannot commit rape of his wife, except as principal in the second degree,[98] yet the indictment need not negative a marriage between the defendant and the injured woman.[99] Still, in prudence, it may be well where fornication and adultery are indictable to insert this sort of negative matter, so that if the proof of force should fail there may be a conviction for one of the other offenses.[1]

§ 957. **Second Degree.**—Where a husband assists one to ravish his wife,[2] or a woman is present helping a man to force another woman,[3] and perhaps in all cases where there are principals in the second degree,[4] it may be practically best to lay the offense according to the outward form; namely, charge the principal of the first degree with doing the act, and the rest with being present assisting. Yet no legal objection appears to averring directly that all did it, each being in law a principal.[5]

§ 958. **The Words "Carnally Know,"**—common in the indictment,[6] are not in the statute of Westm. 2.[7] English views differ as to their necessity in allegation.[8] On principle, since carnal knowledge is confessedly an essential

98. New Crim. Law, II, §§ 1119 (2), 1135; Frazier v. S., 48 Tex. Cr. Ap. 142, 86 S. W. 754.

99. C. v. Fogerty, 8 Gray, 489, 69 Am. D. 264; Curtis v. S., 89 Ark. 394, 117 S. W. 521; S. v. Haddon, 49 S. C. 308, 27 S. E. 194; Belcher v. S. (Tex. Cr. Ap. 1898), 44 S. W. 519; Hurst v. S., 77 Ark. 146, 91 S. W. 8; Parker v. Ter., 9 Okla. 109, 59 P. 9; Contra, P. v. Everett, 10 Cal. Ap. 12, 101 P. 528.

1. Vol. I, § 419; C. v. Murphy, 2 Allen, 163; Dudley v. S., 37 Tex. Cr. Ap. 543, 40 S. W. 269.

2. Rex v. Audley, 3 How. St. Tr. 401, 406; P. v. Chapman, 62 Mich. 280, 4 Am. St. 857, 28 N. W. 896; S. v. Dowell, 106 N. C. 722, 19 Am. St. 568, 11 S. E. 525.

3. S. v. Jones, 83 N. C. 605, 35 Am. R. 586.

4. Rex v. Folkes, 1 Moody, 354; Rex v. Gray, 7 Car. & P. 164; Reg. v. Chrisham, Car. & M. 187; C. v. Fogerty, 8 Gray, 489, 491, 69 Am. D. 264.

5. Ante, § 6a; 1 Russ. Crimes (5th Eng. Ed.) 164, 865; Rex v. Burgess, 1 Russ. Crimes (5th Eng. Ed.) 865; S. v. Comstock, 46 Iowa, 265; Conkey v. P., 5 Par. Cr. 31. But see Kessler v. C., 12 Bush. 18.

6. Ante, § 949.

7. New Crim. Law, II, § 1111.

8. 1 Russ. Crimes (5th Eng. Ed.) 864.

element of the offense,[9] their absence from the statute does not justify their omission from the indictment,[10] unless their meaning is otherwise supplied; and some deem it to be by "ravish."[11] No more specific setting out of the carnal act, than by these words, is required.[12]

§ 959. 1. **"Violently"—"Forcibly."**—The common law form charges the act to have been committed "violently," but not "forcibly."[13] Neither of these words is in any English statute whereon our common law rape is in any part founded,[14] and the necessity of either in averment is problematical. Some of our American statutes have "forcibly;" then "violently" in averment is an adequate substitute.[15]

2. **"Feloniously,"**—in most of our States, is necessary.[16]

§ 960. **For Carnal Abuse**—of a female child under ten (or twelve) years of age,[17] the indictment sets out her name, her age or her being below ten (or twelve), and the defendant's carnal knowledge of her; but it does not aver either her ravishment or her want of consent. And should there be other material statutory terms, it duly covers them.[18]

9. New Crim. Law, II, § 1127 et seq.

10. Vol. II, § 523 et seq.

11. Russ. Crimes, ut sup. and places there referred to.

12. McMath v. S., 55 Ga. 303; Com. v. Hackett, 170 Mass. 194, 48 N. E. 1087; S. v. Cannon, 72 N. J. Law, 46, 60 A. 177; S. v. La Mont, 23 S. D. 174, 120 N. W. 1104. "Abuse" construed. S. v. Ferris, 81 Conn. 97, 70 Atl. 587.

13. Ante, § 949.

14. New Crim. Law, II, §§ 1109-1112.

15. S. v. Johnson, 67 N. C. 55; C. v. Fogerty, 8 Gray, 489, 69 Am. D. 264; Contra, S. v. Blake, 39 Me. 322. See Walling v. S., 7 Tex. Ap. 625; High v. Ter., 12 Ariz. 146, 100 P. 448; P. v. Bailey, 142 Cal. 434, 76 P. 49; S. v. Hann, 73 Minn. 140, 76 N. W. 33.

16. Hays v. S., 57 Miss. 783.

17. New Crim. Law, II, §§ 1112, 1133.

18. Stat. Crimes, §§ 487, 489; Dir. & F., §§ 904, 907, 909; Archb. Crim. Pl. & Ev. (19th Ed.) 767, 768; C. v. Sullivan, 6 Gray, 477; C. v. Sugland, 4 Gray, 7; S. v. Goings, 4 Dev. & Bat. 152; P. v. Mills, 17 Cal. 276; S. v. Black, 63 Me. 210; S. v. Smith, Phillips, N. C. 302; Reg. v. Guthrie, (Law Rep.) 1 C. C. 241, 11 Cox C. C. 522; Reg. v. Holland, 10 Cox C. C. 478. And see Fizell v. S., 25 Wis. 364; Curtis v. S., 89 Ark. 394, 117 S. W. 521; S. v. Hall, 164 Mo. 528, 65 S. W. 248; S. v.

II. *The Evidence.*

§ 961. The most important questions relate to—

The Testimony of the Complaining Woman:—

1. **The Injured Person**—in rape, as in other offenses,[19] is a competent witness.[20] Even a wife, ravished by her husband's procurement, may, as in assault and battery,[21] testify against him.[22]

2. **Too Young.**—If, as sometimes in cases of carnal abuse, the girl is too young or too ignorant of the nature of an oath to testify in the usual way, she cannot give her evidence otherwise, nor can her declarations be proved; so the evidence is lost.[23] And there are various considerations regarding the testimony of young girls.[24]

Skillman, 228 Mo. 434, 128 S. W. 729; Alexander v. S., 58 Tex. Cr. Ap. 621, 127 S. W. 189; Cromeans v. S., 59 Tex. Cr. Ap. 611, 129 S. W. 1129. Girl may state her age, P. v. Elco, 131 Mich. 519, 9 Det. Leg. N. 425, 91 N. W. 755. Want of consent need not be alleged or proved, P. v. Marks, 130 N. Y. S. 524; P. v. Bailey, 142 Cal. 434, 76 P. 49; S. v. Jones, 32 Mont. 442, 80 P. 1095.

19. Vol. II, § 1138 (1).

20. 1 Hale P. C. 633; Boddie v. S., 52 Ala. 395; Wade v. S., 50 Ala. 164; Goss v. S., 40 Tex. 520; S. v. Reed, 39 Vt. 417, 94 Am. D. 337; S. v. Colombo (Del. O. & T. 1909), 75 A. 616; Roberts v. S., 9 Ga. Ap. 807, 72 S. E. 287; S. v. Sysinger, 25 S. D. 110, 125 N. W. 879.

21. Vol. II, § 1153; ante, § 69; Rex v. Azir, 1 Stra. 633.

22. Rex v. Audley, 3 How. St. Tr. 401, 402, 411, 414.

23. 1 East P. C. 441; Rex v. Brazier, 1 East P. C. 443; s. c. nom. Rex v. Brasier, 1 Leach, 199; Rex v. Dunnel, 1 East P. C. 442; Rex v. Powell, 1 Leach, 110; Smith v. S., 41 Tex. 352; Reg. v. Nicholas, 2 Car. & K. 246, 2 Cox C. C. 136; Rex v. Travers, 1 Stra. 700; Weldon v. S., 32 Ind. 81; Johnson v. S., 76 Ga. 76; McMath v. S., 55 Ga. 303, 308; S. v. Crouch, 130 Iowa, 478, 107 N. W. 173; P. v. Beech, 129 Mich. 622, 89 N. W. 363, 8 Det. Leg. N. 1095; Reg. v. Cockburn, 3 Cox C. C. 543; Rex v. Williams, 7 C. & P. 320.

24. Montresser v. S., 19 Tex. Ap. 281; Kelly v. S., 75 Ala. 21, 51 Am. R. 422; P. v. Gage, 62 Mich. 271, 4 Am. St. 854, 28 N. W. 835; Ake v. S., 6 Tex. Ap. 398, 32 Am. R. 586; Carter v. S., 63 Ala. 52, 35 Am. R. 4; Gazley v. S., 17 Tex. Ap. 267; Ellis v. S., 25 Fla. 702, 6 So. 768; Lander v. P., 104 Ill. 248; Batterson v. S., 63 Ind. 531. As to an insane witness, see Lopez v. S., 30 Tex. Ap. 487, 28 Am. St. 935; S. v. Lattin, 29 Conn. 389; McMath v. S., 55 Ga. 303, 308; Rodgers v. S., 30 Tex. Ap. 510, 17 S. W. 1077; Smith v. Com. 85 Va. 924, 927, 9 S. E. 148; Robinson v. S., 143 Wis. 205, 126 N. W. 750.

3. **A Girl Deaf and Dumb**—may testify through an interpreter.[25]

4. **Necessity**—is among the grounds for receiving the injured female's testimony; for without it, a conviction would be commonly impossible. But her evidence is not legally indispensable.[26] And where the woman died after her examination before the magistrate, a conviction was had on her deposition[27] therein given.[28] So, in the absence of a complaining woman, supposed to have been hired to keep away, there was a conviction for an assault with intent to ravish.[29]

§ 962. 1. **Difficulties and Cautions.**—The real facts, in a case of alleged rape, are commonly known only to the defendant and the complaining woman. And she may be honest or dishonest, free from guile or a crafty plotter against him, moved by a sense of justice or by a desire to conceal the shame of having voluntarily surrendered her virtue. If she speaks truth, no completely satisfactory confirmation of her testimony can often be had; if falsehood, nothing is so difficult as for the defendant to make the falsity appear.[30] His temptation to clear himself by foul means, where he cannot by fair, is very great; hers may be, but it is not necessarily, almost as strong to convict him by perjury where the truth will not avail. Therefore it cannot be otherwise than that convictions will sometimes be wrongly had,[31] and sometimes the guilty will go free, and there should be a conviction only on the clearest and most convincing proofs.[32] In consequence of this,—

2. **Impeaching and Supporting.**—The law not only permits the ordinary tests to be applied to the complaining

25. Vol. II, § 1143; P. v. McGee, 1 Denio, 19.

26. Reg. v. Megson, 9 Car. & P. 420; Reg. v. Guttridges, 9 Car. & P. 471.

27. Vol. II, § 1194 et seq.

28. Reg. v. Flemming, 2 Leach, 854.

29. Reg. v. Bates, 2 Par. Cr. 27. And see Weldon v. S., 32 Ind. 81.

30. S. v. Hagerman, 47 Iowa, 151; Smith v. S., 77 Ga. 705.

31. As see 1 Hale P. C. 635, 635.

32. Smith v. S., supra. See Conners v. S., 47 Wis. 523.

witness, but it has some special ones not permissible in other cases; as,—

§ 963. Her Complaints out of Court.—On ordinary grounds, anything which the woman said or did of the *res gestae* of the ravishment will be admissible in evidence.[33] And there is considerable room for strengthening her testimony in this way, especially where she exhibits marks of violence in connection with expressions indicative of her physical condition.[34] But aside from and beyond this, it is competent to show by her, or by others, or both,[35] that after the alleged rape, especially recently after, she complained of it to suitable persons, and exhibited, if such was the fact, marks of violence and other like indications; as confirmatory of her sworn testimony. It is of special practical importance that the complaint was recent, and explanations of any delay are competent.[36] But the doctrine in strict

33. Vol. II, §§ 1083-1087, 1111, 1125; ante, §§ 625, 626; Oleson v. S., 11 Neb. 276, 38 Am. R. 366, 9 N. W. 38; Castello v. S., 31 Tex. Cr. 145, 37 Am. St. 794; Barnett v. S., 83 Ala. 40, 3 So. 612; Barnes v. S., 88 Ala. 204, 208, 7 So. 38, 16 Am. St. 48; Gaines v. S., 167 Ala. 70, 52 So. 643; Skaggs v. S., 88 Ark. 62, 113 S. W. 346; Cunningham v. P., 210 Ill. 410, 71 N. E. 389; S. v. Jerome, 82 Iowa, 749, 48 N. W. 722; P. v. Cage, 62 Mich. 271, 274, 28 N. W. 835, 4 Am. St. 854; S. v. Patrick, 107 Mo. 147, 163, 168, 17 S. W. 666; S. v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. 766; Wells v. S., 43 Tex. Cr. Ap. 451, 67 S. W. 1020; Adams v. S., 50 Tex. Cr. 586, 99 S. W. 1015; Reg. v. Eyre, 2 F. & F. 579.

34. Ante, § 626 (1); Lacy v. S., 45 Ala. 80, 81; S. v. McLaughlin, 44 Iowa, 82; Pefferling v. S., 40 Tex. 486; Reg. v. Guttridges, 9 Car. & P. 471; Reg. v. Osborn, Car & M. 622.

35. Oleson v. S., supra; Castello v. S., supra; Hannon v. S., 70 Wis. 448, 36 N. W. 1; P. v. Brown, 53 Mich. 531, 19 N. W. 172; P. v. Mayes, 66 Cal. 597, 56 Am. R. 126, 6 P. 691; compare with P. v. Tierney, 67 Cal. 54, 7 P. 37; S. v. Mitchell, 68 Iowa, 116, 26 N. W. 44; Barnett v. S., 83 Ala. 40, 3 So. 612; Ellis v. S., 25 Fla. 702, 6 So. 768; Lee v. S., 74 Wis. 45, 41 N. W. 960. "It is the usual course to ask the prosecutrix whether she made any complaint; and, if so, to whom; and, if she mentions a person to whom she made complaint, to call such person to prove that fact." 1 Russ. Crimes (5th Eng. Ed.) 867. And see Woodin v. P., 1 Par. Cr. 464, 467, 468.

36. P. v. Flynn, 96 Mich. 276, 55 N. W. 834; S. v. Byrne, 47 Conn. 465; P. v. Gage, 62 Mich. 271, 4 Am. St. 854, 28 N. W. 835; Pettus v. S., 58 Tex. Cr. Ap. 546, 126 S. W. 868. It is competent to show that the youth of the woman, or her fear of

law appears to be that delays, especially if not great, only weaken the effect of her evidence with the jury.[37] Neither

punishment, or shame, S. v. Walkins, 66 Vt. 1, 10, 28 Atl. 323, 327; S. v. Reid, 39 Mich. 277, 281, 39 N. W. 796; or lack of opportunity, Polson v. S., 137 Ind. 519, 35 N. E. 907, 908; P. v. Terwilliger, 74 Hun (N. Y.) 310, 26 N. Y. S. 674 aff'd 142 N. Y. 629, 37 N. E. 565; S. v. DeWolf, 8 Conn. 93, 20 Am. Dec. 90 or fear or duress of defendant, S. v. Byrne, 47 Conn. 465; S. v. Baker, 136 Mo. 74, 37 S. W. 810; P. v. O'Sullivan, 104 N. Y. 481, 490, 10 N. E. 880, 58 A. 530; S. v. Knapp, 45 N. H. 148, 155; P. v. Glover, 71 Mich. 303, 307, 38 N. W. 874; P. v. Knight (Cal. 1895), 43 Pac. 6, kept her silent.

37. Rex v. Audley, 3 How. St. Tr. 401, 413; Rex v. Clarke, 2 Stark. 241; Nugent v. S., 18 Ala. 521; S. v. Knapp, 45 N. H. 148, 155; S. v. Ivins, 7 Vroom, 233; Gardner v. Kellogg, 23 Minn. 463; Turney v. S., 8 Sm. & M. 104, 47 Am. D. 74; S. v. Marshall, Phillips, N. C. 49; Higgins v. P., 1 Hun, 307; Lacy v. S., 45 Ala. 80; Smith v. S., 47 Ala. 540; Woodin v. P., 1 Par. Cr. 464; S. v. Peter, 8 Jones, N. C. 19; S. v. Niles, 47 Vt. 82; Topolanck v. S., 40 Tex. 160; Baccio v. P., 41 N. Y. 265; Conkey v. P., 1 Abb. Ap. 418; Maillet v. P., 42 Mich. 262, 3 N. W. 854; S. v. Wilson, 91 Mo. 410, 3 S. W. 870; S. v. Witten, 100 Mo. 525, 13 S. W. 871; S. v. Reid, 39 Minn. 277, 39 N. W. 796; Griffin v. State, 76 Ala. 29, 32; Bray v. S., 131 Ala. 46, 31 So. 107; Posey v. S., 143 Ala. 54, 38 So. 1019; Jackson v. S., 92 Ark. 71, 122 S. W. 101; P. v. Barney, 114 Cal. 554, 47 Pac. 41; P. v. Lambert, 120 Cal. 170, 52 Pac. 307; P. v. Keith, 141 Cal. 686, 75 Pac. 304; P. v. Sealamiero, 143 Cal. 343, 76 Pac. 1098; P. v. Gonzalez, 6 Cal. Ap. 255, 91 Pac. 1013; Bueno v. P., 1 Colo. Ap. 232, 28 Pac. 248; S. v. Byrne, 47 Conn. 465, 467; Ter. v. Godfrey, 6 Dak. 46, 50 N. W. 481; S. v. Neil, 13 Idaho, 539, 80 Pac. 860, 91 Pac. 318; P. v. Scattura, 238 Ill. 313, 87 N. E. 332; Polson v. S., 137 Ind. 519, 35 N. E. 907; S. v. Cassidy, 85 Iowa, 145, 52 N. W. 1, 2; S. v. Carpenter, 124 Iowa, 5, 98 N. W. 775; S. v. Egbert, 125 Iowa, 443, 101 N. W. 191; S. v. Bebb, 125 Iowa, 494, 101 N. W. 189; S. v. Symens, 138 Iowa, 113, 115 N. W. 878; S. v. Dudley, 147 Iowa, 645, 126 N. W. 812; S. v. Mulkern, 85 Me. 106, 107, 26 Atl. 1017; P. v. Brown, 53 Mich. 531, 19 N. W. 172; P. v. Gage, 62 Mich. 271, 275, 28 N. W. 835, 4 Am. St. 854; P. v. Glover, 71 Mich. 303, 38 N. W. 874; Dickey v. S., 86 Miss. 525, 38 So. 776; S. v. Patrick, 107 Mo. 147, 163, 17 S. W. 666; S. v. Goodale, 210 Mo. 275, 109 S. W. 9; Oleson v. S., 11 Neb. 276, 279, 9 N. W. 38, 38 Am. 366; Johnson v. S., 27 Neb. 687, 43 N. W. 425; Vaughn v. S., 78 Neb. 317, 110 N. W. 992; Henderson v. S., 85 Neb. 444, 123 N. W. 459; S. v. Knapp, 45 N. H. 148; Baccio v. P., 41 N. Y. 265; Higgins v. P., 58 N. Y. 377, 379; P. v. Garner, 169 N. Y. 585, 62 N. E. 1099; S. v. Stines, 138 N. Car. 686, 50 S. E. 851; S. v. Sudduth, 52 S. Car. 488, 30 S. E. 408; Thompson v. S., 33 Tex. Cr. 472, 26 S. W. 987; Cowles v. S., 51 Tex. Cr. 498, 102 S. W. 1128; S. v. Wilkins, 66 Vt. 1, 17, 28 Atl. 323; S. v.

the particulars of her complaint, nor the name of the person whom she accused, can, by the English and more prevalent American practice, thus be given.[38] They may be brought out by the defendant, if he chooses, on cross-examination.[39] Yet some of our American courts permit the

Hunter, 18 Wash. 670, 52 P. 247; S. v. Griffin, 43 Wash. 591, 86 Pac. 951; S. v. Myrberg, 56 Wash. 384, 105 P. 622; Jackson v. S., 91 Wis. 253, 64 N. W. 838.

38. Baccio v. P., 41 N. Y. 265; Rex v. Clarke, supra; Reg. v. Walker, 2 Moody & R. 212; Brogy v. C., 10 Grat. 722; Stephen v. S., 11 Ga. 225; Reg. v. Megson, 9 Car. & P. 420; Reg. v. Alexander, 2 Crawf. & Dix, C. C. 126; Reg. v. Maclean, 2 Crawf. & Dix, C. C. 350; P. v. McGee, 1 Denio, 19; Reg. v. Osborne, Car. & M. 622; Reg. v. Stroner, 1 Car. & K. 650; S. v. Knapp, supra; Lacy v. S., 45 Ala. 80; S. v. Jones, 61 Mo. 232; Pefferling v. S., 40 Tex. 486; Thompson v. S., 38 Ind. 39; S. v. Richards, 33 Iowa, 420; S. v. Shettleworth, 18 Minn. 209; S. v. Ivins, 7 Vroom, 233; Ellis v. S., 25 Fla. 702, 6 So. 768; S. v. Campbell, 20 Nev. 122, 17 P. 620; S. v. Robertson, 38 La. Ann. 618, 58 Am. R. 201; Griffin v. S., 76 Ala. 29; Parker v. S., 67 Md. 329, 1 Am. St. 387, 10 A. 219; P. v. Mayes, 66 Cal. 597, 56 Am. R. 126, 6 P. 691; P. v. Clemons, 37 Hun, 580; Williams v. S., 66 Ark. 264, 50 S. W. 517; P. v. Stewart, 97 Cal. 238, 32 Pac. 8; P. v. Lambert, 120 Cal. 170, 52 P. 307; Ellis v. S., 25 Fla. 702, 708, 6 So. 768; Lowe v. S., 97 Ga. 792, 25 S. E. 676; S. v. Fowler, 13 Idaho, 317, 89 Pac. 757; Stevens v. P., 158 Ill. 111, 41 N. E. 856; P. v. Weston, 236 Ill. 104, 86 N. E. 188; P. v. Scattura, 238 Ill. 313, 87 N. E. 332; Pulley v. S., 174 Ind. 542, 92 N. E. 55; Messel v. S. (Ind. 1911), 95 N. E. 565; S. v. Novak, 151 Ia. 536, 132 N. W. 565; S. v. Mitchell, 68 Iowa, 116, 119, 26 N. W. 44; S. v. Clark, 69 Iowa, 294, 28 N. W. 626; S. v. Symens, 138 Iowa, 113, 15 N. W. 878; S. v. Daugerthy, 63 Kan. 473, 65 P. 695; S. v. Langford, 45 La. Ann. 1177, 1179, 14 So. 181, 40 Am. St. 277; Parker v. S., 67 Md. 329, 10 Atl. 219, 1 Am. 387; P. v. Bernor, 115 Mich. 692, 74 N. W. 184; Jeffries v. S., 89 Miss. 643, 42 So. 801; Oleson v. S., 11 Neb. 276, 279, 9 N. W. 38, 38 Am. 366; P. v. Friedman, 139, 7 Ap. Div. 795, 124 N. Y. S. 521; S. v. Dawson, 88 S. C. 225, 70 S. E. 721; Holst v. S., 23 Tex. Ap. 1, 3 S. W. 757, 59 Am. 770; S. v. Griffin, 43 Wash. 591, 86 Pac. 951; Hannon v. S. 70 Wis. 448, 451, 36 N. W. 1; Lee v. S., 74 Wis. 45, 41 N. W. 960; Smits v. S., 145 Wis. 601, 130 N. W. 525.

39. Reg. v. Walker, 2 Moody & R. 212; S. v. Jones, 61 Mo. 232; Scott v. S., 48 Ala. 420, 421; S. v. Clark, 69 Iowa, 294, 28 N. W. 606; S. v. Langford, 45 La. Ann. 1177, 14 So. 181; Reg. v. Little, 15 Cox, C. C. 319; Barnett v. S., 83 Ala. 40, 44, 3 So. 612; Huey v. S., 7 Ga. Ap. 398, 66 S. E. 1023; Parker v. S., 67 Md. 329, 331, 10 Atl. 219; S. v. Patrick, 107 Mo. 147, 17 S. W. 666; Wood v. S., 46 Neb. 58, 64 N. W. 355; S. v. Freeman, 100 N. Car. 429, 433, 5 S. E. 921.

prosecuting officer to call for these particulars, to a greater or less extent, in the first instance.[40] The effect of this evidence is merely to sustain the witness, it is not independent proof.[41] If, therefore, the injured female does not appear as a witness, this evidence cannot be given.[42] But what is of the *res gestae,* as stated in the opening of this section, is competent whether she testifies or not.[43]

§ 964. 1. **Truth and Veracity.**—This witness, like any other, may be impeached by evidence of a bad reputation for truth and veracity;[44] in response to which, testimony to her good character is permissible.[45] And—

2. **Character otherwise.**—There are cases, perhaps exceptional in their circumstances, wherein the sustaining evidence of her good character has been received when she

40. S. v. Peter, 14 La. Ann. 521; McCombs v. S., 8 Ohio St. 643; Laughlin v. S., 18 Ohio, 99, 51 Am. D. 444; Johnson v. S., 17 Ohio, 593; Burt v. S., 23 Ohio St. 394, 401; Phillips v. S., 9 Humph. 246, 49 Am. D. 709; S. v. De Wolf, 8 Conn. 93, 100, 20 Am. D. 90; S. v. Kinney, 44 Conn. 153, 157, 26 Am. R. 436. And see Pleasant v. S. 15 Ark. 624.

Particulars after evidence attacked. Besides this, as a distinct doctrine, when the defendant has attacked the evidence of the complaining witness, some courts, I cannot say how extensively, permit the prosecuting officer then to prove that she gave in her early disclosures the same details which she has narrated as a witness. Scott v. S., 48 Ala. 420, 421; S. v. Jones, 61 Mo. 232; S. v. Laxton, 78 N. C. 564; Barnett v. S., 83 Ala. 40. See Smith v. S., 51 Wis. 615, 37 Am. R. 845; S. v. Byrne, 47 Conn. 465; S. v. Hutchinson, 95 Iowa, 566, 64 N. W. 610; S. v. Carpenter, 124 Iowa, 5, 98 N. W. 775; S. v. Langford, 45 La. Ann. 1177, 1180, 14 So. 181, 40 Am. St. 277; Oleson v. S., 11 Neb. 276, 281, 9 N. W. 38, 38 Am. 366; S. v. Parker, 134 N. Car. 209, 46 S. E. 511; S. v. Wener, 16 N. Dak. 83, 112 N. W. 60; Proper v. S., 85 Wis. 615, 55 N. W. 1035.

41. Cases in the last note; also P. v. McGee, 1 Denio, 19; Thompson v. S., 38 Ind. 39, 40; S. v. Niles, 47 Vt. 82.

42. Weldon v. S., 32 Ind. 81; Thompson v. S., 38 Ind. 39; Smith v. S., 41 Tex. 352.

43. See Pefferling v. S., 40 Tex. 486; Lacy v. S., 45 Ala. 80; Rex v. Cockburn, 3 Cox, C. C. 543.

Husband. As to what is said by the husband of the ravished woman, see McCombs v. S., 8 Ohio St. 643; Conkey v. P., 1 Abb. Ap. 418, 5 Par. Cr. 31; Woodin v. P., 1 Par. Cr. 464.

44. 1 Greenl. Ev. § 461; Pratt v. S., 19 Ohio St. 277; Reg. v. Tissington, 1 Cox, C. C. 48.

45. 1 Greenl. Ev., § 469; Rex v. Clarke, 2 Stark. 241.

has not been attacked;[46] but the general and better doctrine admits it only to repel an attack.[47]

§ 965. **Bad Reputation for Chastity.**—Though, in ordinary cases, it is not allowable to prove that an adverse female witness is unchaste,[48]—and the ravishment of a prostitute is, in law, rape, the same as of any other woman,[99]—still one on trial for this crime may bring forward, in his defense, the bad reputation for chastity—not particular acts—of the complaining witness, or, by the better opinion, the fact of her being a common prostitute.[50] This evidence is sometimes regarded as properly impairing her credibility,—a doubtful proposition, and in some of the cases denied. But it helps the probabilities that the connection was voluntary on her part, and that his manifestations of apparent force came rather from his presuming her consent than from a purpose to ravish her.[51] Some of

46. Turney v. S., 8 Sm. & M. 104, 116, 117, 47 Am. D. 74; S. v. De Wolf, 8 Conn. 93, 20 Am. D. 90.

47. P. v. Hulse, 3 Hill, N. Y. 309.

48. C. v. Churchill, 11 Met. 538, 45 Am. D. 229; Smithwick v. Evans, 24 Ga. 461; S. v. Randolph, 24 Conn. 363; Craft v. S., 3 Kan. 450.

49. New Crim. Law, II, § 1119 (1).

50. P. v. McLean, 71 Mich. 309, 15 Am. St. 263, 38 N. W. 917; McQuirk v. S., 84 Ala. 435, 5 Am. St. 381, 4 So. 775; O'Blenis v. S., 18 Vroom, 279; S. v. Daniel, 87 N. C. 507; Wilson v. S., 17 Tex. Ap. 525; Favors v. S., 20 Tex. Ap. 155; S. v. Reed, 41 La. Ann. 581, 7 So. 132; S. v. Campbell, 20 Nev. 122, 17 P. 620; C. v. Harris, 131 Mass. 336; Shartzer v. S., 63 Md. 149, 52 Am. R. 501; Rice v. S., 35 Fla. 236, 17 So. 286; S. v. Turner, 1 Houst. Crim. 76. See S. v. Cook, 65 Iowa, 500, 22 N. W. 675; S. v. Freeman, 100 N. C. 429, 5 S. E. 921; Fry v. C., 82 Va. 334; Herndon v. S., 2 Ala. Ap. 118, 56 So. 85; Jackson v. S., 92 Ark. 71, 122 S. W. 101; P. v. Johnson, 106 Cal. 289, 39 Pac. 622; S. v. Brauneis (Conn. 1911), 79 A. 70; Black v. S., 119 Ga. 746, 47 S. E. 370; Anderson v. S., 104 Ind. 467, 471, 4 N. E. 63, 5 N. E. 711; S. v. Eberline, 47 Kan. 155, 27 Pac. 839; S. v. Brown, 55 Kan. 766, 42 Pac. 626; Clark v. Com., 92 S. W. 573, 29 Ky. L. 154, 14 L. R. A. (N. S.) 714; Com. v. Kendall, 113 Mass. 210, 211, 18 Am. 469; P. v. Ryno, 148 Mich. 137, 111 N. W. 740, 14 Det. Leg. N. 69; Brown v. S., 72 Miss. 997, 17 So. 275; Myers v. S., 51 Neb. 517, 71 N. W. 33; Shields v. S., 32 Tex. Cr. 498, 502, 23 S. W. 893; S. v. Hollenbeck, 67 Vt. 34, 30 Atl. 696; S. v. Barrick, 60 W. Va. 576, 55 S. E. 652; S. v. Detwiler, 60 W. Va. 583, 55 S. E. 654; Rex v. Barker, 3 C. & P. 589.

51. Reg. v. Clay, 5 Cox, C. C. 146; Woods v. P., 55 N. Y. 515, 14

the cases limit this evidence to her character or reputation prior to the time of the alleged rape, in accordance with a part of the reasons on which it is received;[52] but other reasons suggest no such limitation, and other of the cases make none. The latter is believed to be the better doctrine.[53]

§ 966. 1. If to the Defendant—the woman has voluntarily surrendered her person on a previous occasion, this, even more than her being a common prostitute, indicates her willingness and his presuming on it; therefore he may show it in his defense,[54] or call it out from her on cross-examination.[55] But—

Am. R. 309; Brennan v. P., 7 Hun, 171; S v. Forshner, 43 N. H. 89; Dorsey v. S., 1 Tex. Ap. 33; Rogers v. S., 1 Tex. Ap. 187; C. v. McDonald, 110 Mass. 405, 406; Leoni v. S., 44 Ala. 110; Conkey v. P., 5 Par. Cr. 31, 36; S. v. Reed, 39 Vt. 417, 419, 94 Am. D. 337; C. v. Kendall, 113 Mass. 210, 18 Am. R. 469; Rex v. Clarke, 2 Stark. 241, 244; Reg. v. Tissington, 1 Cox, C. C. 48; McCombs v. S., 8 Ohio St. 643; Camp v. S., 3 Kelly, 417; S. v. Henry, 5 Jones, N. C. 65; S. v. Jefferson, 6 Ire. 305; Pleasant v. S., 15 Ark. 624; Rex v. Hodgson, Russ. & Ry. 211; Reg. v. McClure, 2 Crawf. & Dix, C. C. 244; McDermott v. S., 13 Ohio St. 332, 82 Am. D. 444. See Richie v. S., 58 Ind. 355. Bad character in the parents of the ravished woman is not admissible. S. v. Anderson, 19 Mo. 241; S. v. Williams (Del. 1911), 80 A. 1004; Seals v. S., 114 Ga. 518, 40 S. E. 731.

52. Pratt v. S., 19 Ohio St. 277; S. v. Forshner, 43 N. H. 89, 80 Am. D. 132; S. v. Ward, 73 Iowa, 532, 35 N. W. 617.

53. Reg. v. Clay, 5 Cox, C. C. 146, and cases there referred to; namely, Rex v. Barker, 3 Car. & P. 589; Rex v. Clarke, 2 Stark. 241; Rex v. Martin, 6 Car. & P. 562. Still these cases are not very strong to the doctrine of the text.

54. S. v. Jefferson, 6 Ire. 305; S. v. Forshner, 43 N. H. 89; P. v. Abbot, 19 Wend. 192; Woods v. P., 55 N. Y. 515, 517, 14 Am. R. 309; S. v. Reed, 39 Vt. 417, 419, 94 Am. D. 337; Barnes v. S., 88 Ala. 204, 207, 7 So. 38, 16 Am. St. 48; P. v. Jacobs, 16 Cal. Ap. 478, 117 P. 615; Bedgood v. S., 115 Ind. 275, 279, 17 N. E. 621; S. v. Cassidy, 85 Iowa, 145, 52 N. W. 1; Hall v. P., 47 Mich. 636, 11 N. W. 414; P. v. Abbott, 97 Mich. 484, 486, 56 N. W. 862, 37 Am. St. 360; P. v. Grauer, 12 Ap. Div. (N. Y.) 464, 42 N. Y. S. 721; S. v. Coss, 53 Ore. 462, 101 P. 193; S. v. Ogden, 39 Ore. 195, 65 P. 449; S. v. Sysinger, 25 S. D. 110, 125 N. W. 879; S. v. Conlin, 45 Wash. 478, 88 Pac. 932; Rex v. Martin, 6 C. & P. 562. But not in statutory rape. S. v. Dlugozima, 7 Pen. (Del.) 151, 74 A. 1086.

55. Rex v. Martin, 6 Car. & P. 562; Pleasant v. S., 15 Ark. 624.

2. **With Other Men,**—in individual instance, he cannot by the better opinion prove that she has been unchaste, to impair her testimony, or for any other purpose. It would not show her readiness to yield to him, or afford him reason to presume it.[56] Still, by the practice of most courts,[57] refused by some,[58] the latitude of cross-examination permits her to be asked therein a question of this sort; then, if she makes denial of the connection, it binds the defendant who cannot prove it false.[59]

§ 967. 1. Added to the Foregoing,—this witness may be sustained or impeached by the same methods as others; as,—

56. Cases cited ante, § 965; C. v. Regan, 105 Mass. 593; Dorsey v. S., 1 Tex. Ap. 33; Rogers v. S., 1 Tex. Ap. 187; Woods v. P., supra, and 1 Thomp. & C. 610; McCombs v. S., 8 Ohio St. 643; McDermott v. S., 13 Ohio St. 332, 334, 82 Am. D. 444; Rex v. Hodgson, Russ. & Ry. 211; S. v. Forshner, 43 N. H. 89, 80 Am. D. 132; P. v. Benson, 6 Cal. 221, 65 Am. D. 506. See Shirwin v. P., 69 Ill. 55; Strang v. P., 24 Mich. 1. Contra, Benstine v. S., 2 Lea, 169, 31 Am. R. 593; Titus v. S., 7 Bax. 132; Ross v. S., 60 Tex. Cr. Ap. 547, 132 S. W. 793. As to statutory rape. Heath v. S., 173 Ind. 296, 90 N. E. 310; S. v. Rivers, 82 Conn. 454, 74 A. 757; P. v. Nichols, 159 Mich. 355, 124 N. W. 25, 16 Det. Leg. N. 890; Plunkett v. S., 72 Ark. 409, 82 S. W. 845.

57. P. v. Abbot, supra; S. v. Johnson, 28 Vt. 512; S. v. Murray, 63 N. C. 31; Reg. v. Mercer, 6 Jur. 243; Reg. v. Cockroft, 11 Cox, C. C. 410; S. v. Reed, 39 Vt. 417. See C. v. McDonald, 110 Mass. 405, 406; McQuirk v. S., 84 Ala. 435, 4 So. 775, 5 Am. 381; P. v. Shea, 125 Cal. 151, 57 P. 885; S. v. Cassidy, 85 Iowa, 145, 149, 52 N. W. 1; Com. v. Kendall, 113 Mass. 210, 211; P. v. McLean, 71 Mich. 309, 38 N. W. 917, 15 Am. St. 263; P. v. Abbott, 97 Mich. 484, 486, 56 N. W. 862, 37 Am. St. 360; S. v. Patrick, 107 Mo. 147, 17 S. W. 666; S. v. Campbell, 20 Nev. 122, 17 Pac. 620; S. v. Knapp, 45 N. H. 148, 156; S. v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. 766; S. v. Rash (S. D. 1911), 130 N. W. 91; S. v. Bebb, 125 Iowa, 194, 101 N. W. 189.

58. Pleasant v. S., supra; S. v. Knapp, 45 N. H. 148; P. v. Benson, 6 Cal. 221, 65 Am. Dec. 506; P. v. Knight (Cal. 1895), 43 Pac. 6; S. v. Whitesell, 142 Mo. 467, 44 S. W. 332; P. v. Abbott, 19 Wend. (N. Y.) 192; Benstine v. S., 2 Lea (Tenn.) 169, 173, 31 Am. 593; S. v. Johnson, 28 Vt. 512, 513, 515.

59. Reg. v. Crockroft, supra; Reg. v. Holmes, Law Rep. 1 C. C. 334, 12 Cox, C. C. 137; Reg. v. Dean, 6 Cox, C. C. 23; P. v. Jackson, 3 Par. Cr. 391. But see Reg. v. Robins, 2 Moody & R. 512; Bader v. S., 57 Tex. Cr. Ap. 293, 122 S. W. 555.

2. **By her Declarations,**—contrary to her oath.[60] And—

3. **Other**—strengthening or impairing evidence may, within the general rules, be given.[61] So—

4. **To the Entire Fact**—she may be questioned.[62]

§ 968. 1. **Court or Jury.**—The court admits and rejects the testimony of and relating to the prosecuting witness, and instructs the jury on what it receives, the same in these cases as in others. It advises and cautions them concerning the evidence and the peculiarities of the particular question after the general practice in criminal trials.[63] But there is no rule of law limiting their powers; and they are to believe her or not, or otherwise allow such weight to her testimony, as their judgments, in the particular instance and circumstances, dictate.[64] Thus—

60. Shirwin v. P., 69 Ill. 55; Kennedy v. P., 44 Ill. 283; Reg v. Dean, 6 Cox, C. C. 23; S. v. Curtis, 77 Mo. 267.

61. Pleasant v. S., 13 Ark. 360; P. v. Ardaga, 51 Cal. 371; S. v. Comstock, 46 Iowa, 265; S. v. Otey, 7 Kan. 69; McFarland v. S., 24 Ohio St. 329; S. v. Jerome, 33 Conn. 265; S. v. Patrick, 107 Mo. 147, 17 S. W. 666; Lawson v. S., 17 Tex. Ap. 292; S. v. Murphy, 118 Mo. 7, 25 S. W. 95; S. v. Starnes, 94 N. C. 973; Hall v. P. 47 Mich. 636, 11 N. W. 414; P. v. Evans, 72 Mich. 367, 40 N. W. 473; Gazley v. S., 17 Tex. Ap. 267; Fager v. S., 22 Neb. 332, 35 N. W. 195.

62. P. v. Ardaga, supra; Woodin v. P., 1 Par. Cr. 464; Rogers v. P., 34 Mich. 345; Coates v. S., 2 Tex. Ap. 16; S. v. Hodges, Phillips, N. C. 231; P. v. Manahan, 32 Cal. 68; Hardtke v. S., 67 Wis. 552, 30 N. W. 723; S. v. Porter, 57 Iowa, 691, 11 N. W. 644; Bessette v. S., 101 Ind. 85; S. v. Hatfield, 72 Mo. 518; P. v. Flynn, 96 Mich. 276, 55 N. W. 834; S. v. Hartnett, 75 Mo. 251; Lowry v. Com., 23 Ky. L. 1553, 65 S. W. 434. She may be asked if she consented. Woodin v. P., 1 Park. Cr. (N. Y.) 464; Brown v. S., 127 Wis. 193, 106 N. W. 536; Schults v. S., 49 Tex. Cr. 351, 91 S. W. 786 or if she was trying to blackmail. Shirwin v. P., 69 Ill. 55, 59; P. v. Knight (Cal. 1895), 43 Pac. 6.

63. Reynolds v. S., 27 Neb. 90, 20 Am. St. 659, 42 N. W. 903.

64. 1 Hale, P. C. 633; Goss v. S., 40 Tex. 520; Hogan v. S., 46 Miss. 274; Jenkins v. S., 1 Tex. Ap. 346; Leoni v. S., 44 Ala. 110; Innis v. S., 42 Ga. 473; P. v. Abbot, 19 Wend. 192; S. v. Cross, 12 Iowa, 66; S. v. Mylor, 46 Iowa, 192; S. v. Hagerman, 47 Iowa, 151; S. v. McLaughlin, 44 Iowa, 82; Wade v. S., 50 Ala. 164. Perhaps some of these cases leave a little less discretion to the jury than is allowed by my text; but, on the whole, I deem the text sustained by the authorities, as well as by the juridical reason of the thing. And compare with Vol. II.

2. **On the Unsupported Testimony**—even of a strumpet they can convict.[65] And the court, if dissatisfied with the verdict, can set it aside.[66] Or they may convict on the uncorroborated testimony of a girl below ten years of age.[67]

§ 969. *Other Evidence:*—

Outcries—from the ravished woman, or the fact that there were none, considered with her surroundings, and her probable promptings to make or withhold them, are circumstances to be taken into the account as of just and great weight.[68]

§§ 1169, 1170; Rivers v. S., 8 Ga. Ap. 703, 70 S. E. 50; Druin v. Com. (Ky. 1910), 124 S. W. 856; Maxfield v. S., 54 Neb. 44, 74 N. W. 401; S. v. Fujita, 20 N. D. 555, 129 N. W. 360.

65. Barnett v. S., 83 Ala. 40, 3 So. 612; S. v. Dusenberry, 112 Mo. 277, 20 S. W. 461; Boddie v. S., 52 Ala. 395, 398; Herndon v. S., 2 Ala. Ap. 118, 56 So. 85; Trimble v. Ter., 8 Ariz. 273, 71 P. 932; P. v. Keith, 141 Cal. 686, 75 Pac. 364; P. v. Currie 16 Cal. Ap. 731, 117 P. 941; P. v. Doyle (Fla. 1897), 22 So. 272; Scott v. S., 3 Ga. Ap. 479, 60 S. E. 112; S. v. Anderson, 6 Idaho, 706, 59 P. 180; P. v. Freeman, 244 Ill. 590, 91 N. E. 708; S. v. Brown, 85 Kan. 418, 116 P. 508; Lynn v. Com., 11 Ky. L. 772, 13 S. W. 74; Allen v. S. (Miss. 1908), 45 So. 833; S. v. Welch, 191 Mo. 179, 89 S. W. 945; S. v. Wilcox, 111 Mo. 569, 26 S. W. 314, 33 Am. St. 551; S. v. Day, 188 Mo. 359, 87 S. W. 465; S. v. Jones, 32 Mont. 442, 80 Pac. 1095; Mathews v. S., 19 Neb. 330, 27 N. W. 234; Fager v. S., 22 Neb. 332, 35 N. W. 195; Hammond v. S., 39 Neb. 252, 58 N. W. 92; S. v. Tutle, 67 Ohio St. 51, 440, 66 N. E. 524; Johnson v. S., 6 Okla. Cr. Ap. 1, 112 P. 760; Hast v. Ter., 5 Okla. Cr. Ap. 162, 114 P. 261; S. v. Rash (S. D. 1911), 130 N. W. 91; Hill v. S. (Tex. Cr.), 77 S. W. 808; Thomas v. Com., 06 Va. 855, 56 S. E. 705; Givens v. Com., 29 Gratt. (Va.) 830, 835; S. v. Fetterly, 33 Wash. 599, 74 Pac. 810; S. v. Conlin, 45 Wash. 478, 88 Pac. 932; Lanphere v. S., 114 Wis. 193, 89 N. W. 128; Brown v. S., 127 Wis. 193, 106 N. W. 536; S. v. Knighten, 39 Ore. 63, 64 P. 866.

66. Topolanck v. S., 40 Tex. 160. And see P. v. Ardaga, 51 Cal. 371; Whitney v. S., 35 Ind. 503.

67. S. v. Lattin, 29 Conn. 389; Anonymous, 1 Russ. Crimes (3d Eng. Ed. 696 and note. S. v. Wheeler, 116 Ia. 212, 89 N. W. 978.

68. 1 Hale, P. C. 633; S. v. Cone, 1 Jones, N. C. 18; S. v. Cross, 12 Iowa, 66, 79 Am. D. 519; Barney v. P., 22 Ill. 160; P. v. Abbot, 19 Wend. 192, 194; Rogers v. S., 1 Tex. Ap. 187; Whitney v. S., 35 Ind. 503; Mings v. C., 85 Va. 638, 8 S. E. 474; Eyler v. S., 71 Ind. 49; Lawson v. S., 17 Tex. Ap. 292; S. v. Hagerman, 47 Iowa, 151; Eberhart v. S., 134 Ind. 651, 34 N. E. 637; P. v. Flynn, 96 Mich. 276, 55 N. W. 834. And see Jenkins v. S., 1 Tex. Ap. 346; Bean v. P., 124 Ill. 576, 580, 16 N. E. 656;

§ 970. 1. **That the Defendant was predisposed**—to commit this sort of offense, or his confessions or the fact of having ravished other women, cannot be shown against him.[69] Even on a trial for assault with intent to commit a rape, an English judge rejected evidence that, on a previous occasion, the defendant had taken liberties with the same woman.[70] The contrary to this, believed to be the better law, has been adjudged with us.[71] Still, prior conduct amounting only to a solicitation to the woman will perhaps ordinarily be inadmissible; as not indicating the purpose to take the further step, and force her.[72] Where successive assaults are virtually one continuing transaction, all have been ruled, in England, to be receivable.[73] But—

2. **A Prior Purpose**—to ravish the same woman, or per-

Eberhart v. S., 134 Ind. 651, 636, 34 N. E. 637; S. v. Brown, 54 Kan. 71, 72, 37 Pac. 996; S. v. Brown, 85 Kan. 418, 116 P. 508; S. v. Reid, 39 Minn. 277, 279, 39 N. W. 796; S. v. Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; P. v. Kirwan, 22 N. Y. S. 160, 67 Hun (N. Y.) 652; Reynolds v. P., 41 How. Pr. (N. Y.) 179; P. v. Morrison, 1 Park. Cr. (N. Y.) 625, 644; Warren v. S., 54 Tex. Cr. 443, 114 S. W. 380; Brown v. Com., 82 Va. 653.

69. Rex v. Cole, 1 Russ. Crimes (5th Eng. Ed.) 881; S. v. Walters, 45 Iowa, 389; P. v. Bowen, 49 Cal. 654. And see Sutton v. Johnson, 62 Ill. 209. See, as to this sort of question, Stat. Crimes, §§ 679-684; P. v. Stewart, 85 Cal. 174, 24 Pac. 722; S. v. LaMont, 23 S. Dak., 174, 120 N. W. 1104.

70. Rex v. Lloyd, 7 Car. & P. 318; S. v. Dlugozima, 7 Pen. (Del), 151, 74 A. 1086; Janzen v. P., 159 Ill. 440, 42 N. E. 862; S. v. Stevens, 56 Kan. 720, 44 Pac. 992; S. v. Thompson, 14 Wash. 285, 44 Pac. 533; S. v. Sheets, 127 Iowa, 73, 102 N. W. 415; Reinoehl v. S., 62 Neb. 619, 87 N. W. 355.

71. Williams v. S., 8 Humph. 585; S. v. Walters, 45 Iowa, 389; S. v. Patrick, 107 Mo. 147, 17 S. W. 666. See S. v. Neely, 74 N. C. 425, 21 Am. R. 496; Barnes v. S., 88 Ala. 204, 207, 7 So. 38, 16 Am. St. 48; P. v. Manahan, 32 Cal. 68; P. v. Morris, 3 Cal. Ap. 1, 84 Pac. 463; S. v. Trusty, 122 Iowa, 82, 97 N. W. 989; S. v. Carpenter, 124 Iowa, 5, 98 N. W. 775; S. v. Crouch, 130 Iowa, 478, 107 N. W. 173; S. v. Borchert, 68 Kan. 360, 74 Pac. 1108; P. v. Abbott, 97 Mich. 484, 486, 56 N. W. 662, 37 Am. St. 360; S. v. Campbell, 210 Mo. 202, 109 S. W. 706; P. v. O'Sullivan, 104 N. Y. 481, 10 N. E. 880, 58 Am. 530; S. v. Parish, 104 N. Car. 679, 10 S. E. 457; S. v. Robison, 32 Ore. 43, 48 Pac. 357; Taylor v. S., 22 Tex. Ap. 529, 545, 3 S. W. 753, 58 Am. 636n; S. v. Fetterly, 33 Wash. 599, 74 Pac. 810; Hardtke v. S., 67 Wis. 552, 554, 30 N. W. 723.

72. Thompson v. S., 43 Tex. 583.

73. Reg. v. Rearden, 4 Fost. & F. 76.

haps any other, as indicated by threats or other evidence, may be shown.[74]

3. **The Relative Strength**—of the man and woman may be taken into the account.[75]

4. **Harsh Treatment**—of the female by the defendant, in whose family she was a servant, has been held inadmissible.[76]

§ 971. 1. **Conception**—was formerly supposed to rebut the charge of rape, as showing the woman's consent. "But it is now admitted on all hands that such an opinion has no sort of foundation either in reason or law."[77]

2. **Her Declarations in Travail**,—if she conceived, are not competent against her ravisher.[78] But—

§ 972. 1. **Any Testimony**,—admissible on general principles, may be brought forward in these cases;[79] for exam-

74. Wood v. S., 28 Tex. Ap. 61; Barnes v. S., 88 Ala. 204, 16 Am. St. 48, 7 So. 38; Massey v. S., 31 Tex. Cr. 371, 20 S. W. 758; Sharp v. S., 15 Tex. Ap. 171; Robinson v. S., 143 Wis. 205, 126 N. W. 750; S. v. Harris, 150 Mo. 56, 51 S. W. 481.

75. S. v. Knapp, 45 N. H. 148; Jenkins v. S., 1 Tex. Ap. 346.

76. P. v. Tyler, 36 Cal. 522.

77. 1 East, P. C. 445; Young v. Johnson, 123 N. Y. 226, 25 N. E. 363; P. v. Tarbox, 115 Cal. 57, 46 P. 896; S. v. Henderson, 19 Ida. 524, 114 P. 30; S. v. Walker, 69 Kan. 183, 76 Pac. 408; S. v. Miller, 71 Kan. 20, 80 Pac. 51; S. v. Stone, 74 Kan. 189, 85 Pac. 808; Druin v. Com. (Ky. 1910), 124 S. W. 856; S. v. Johnson, 114 Minn. 493, 131 N. W. 629; S. v. Danforth, 73 N. H. 215, 60 Atl. 839, 111 Am. St. 600.

78. S. v. Hussey, 7 Iowa, 409. Complainant may testify accused is father of her child. Whitehead v. S. (Tex. 1911), 137 S. W. 356.

79. Champ v. C., 2 Met. Ky. 17, 74 Am. D. 388; McMath v. S., 55 Ga. 303; Nugent v. S., 18 Ala. 521; Brauer v. S., 25 Wis. 413; Turney v. S., 8 Sm. & M. 104, 47 Am. D. 74; S. v. Shields, 45 Conn. 256; Mills v. S., 52 Ind. 187; Huber v. S., 126 Ind. 185, 25 N. E. 904; S. v. Taylor, 118 Mo. 153, 24 S. W. 449; P. v. Flynn, 96 Mich. 276, 55 N. W. 834; Lander v. P., 104 Ill. 248; Fitzgerald v. S., 20 Tex. Ap. 281; S. v. Blunt, 59 Iowa, 468, 13 N. W. 427; Cotton v. S., 87 Ala. 75, 6 So. 396; Schnicker v. P., 88 N. Y. 192; Coleman v. C., 84 Va. 1, 3 S. E. 878; Proper v. S., 85 Wis. 615, 55 N. W. 1035; S. v. Spidle, 42 Kan. 441, 22 P. 620; S. v. Patrick, 107 Mo. 147, 17 S. W. 666; Lincecum v. S., 29 Tex. Ap. 328, 15 S. W. 818; Harris v. S., 2 Ala. Ap. 116, 56 So. 55; Colombo v. S. (Del.), 78 A. 595, affirming judgment. S. v. Colombo, 75 A. 616. Evidence procured by physician at his physical examination of accused rejected as compelling accused to testify against himself. S. v. Newcomb, 220 Mo. 54, 119 S. W. 405.

ple, stains on clothing.[80]

2. **Variance.**—On a charge of rape by force the evidence may be that it was by threats.[81]

§ 973 **Experts.**—A physician cannot be asked whether a ravishment could have been effected in a particular way, if, in the answer, is involved no professional knowledge.[82] Still, there is a wide range for expert evidence in these cases.[83]

§ 974. **The Duty of the Court**—to instruct the jury, and theirs to judge of the evidence, already explained as to the testimony of the complaining woman,[84] extends also to the entire case.[85]

III. *Questions of Practice.*

§ 975. 1. **In Two Counts,**—the indictment may charge

80. S. v. Montgomery, 79 Iowa, 737, 45 N. W. 292; S. v. Murphy, 118 Mo. 7, 25 S. W. 95; Ransbottom v. S., 144 Ind. 250, 43 N. E. 218; S. v. Duffy, 124 Mo. 1, 10, 27 S. W. 358, 360; Gonzales v. S., 32 Tex. Cr. 611, 620, 25 S. W. 781.

81. Bass v. S., 16 Tex. Ap. 62; Cornelius v. S., 13 Tex. Ap. 349. See P. v. Snyder, 75 Cal. 323, 17 P. 208.

82. Cook v. S., 4 Zab. 843; Woodin v. P., 1 Par. Cr. 464. See Noonan v. S., 55 Wis. 258; P. v. Royal, 53 Cal. 62.

83. Young v. Johnson, 123 N. Y. 26, 25 N. E. 363; Davis v. S., 42 Tex. 226; P. v. Glover, 71 Mich. 303, 38 N. W. 874; Myers v. S., 84 Ala. 11, 4 So. 291; Fay v. Swan, 44 Mich. 544, 7 N. W. 215; Sigerella v. S. (Del. 1910), 74 A. 1081; S. v. Colombo (Del. O. & T. 1909), 75 A. 616; S. v. King, 117 Ia. 484, 91 N. W. 768; S. v. Dudley, 147 Iowa, 645, 126 N. W. 812; S. v. Rash (S. D. 1911), 130 N. W. 91; Hutcherson v. S., 62 Tex. Cr. Ap. 1, 136 S. W. 53. A medical examination is discretionary. Frazier v. S., 56 Ark. 242, 19 S. W. 838; McGuff v. S., 88 Ala. 147; 153, 7 So. 35, 16 Am. St. 125. Physician having made examination may state details as to bruises. Myers v. S., 84 Ala. 11, 12, 4 So. 291; Polson v. S., 137 Ind. 519, 35 N. E. 907; Nell v. S., 49 Tex. Cr. 219, 91 S. W. 791; and condition of genital organs; S. v. Symens, 138 Ind. 113, 115 N. W. 878; Gifford v. P., 148 Ill. 173, 35 N. E. 754. Non-experts may sometimes testify to physical condition of woman. S. v. Murphy, 118 Mo. 7, 25 S. W. 95; S. v. Sanford, 124 Mo. 484; Polson v. S., 137 Ind. 119, 35 N. E. 901; S. v. Sudduth, 52 S. C. 488, 30 S. E. 484; Smith v. S., 52 Tex. Cr. 344, 106 S. W. 1161.

84. Ante, § 968.

85. Brown v. P., 36 Mich. 203; S. v. Dancy, 78 N. C. 437; Cato v. S., 9 Fla. 163; Dawson v. S., 29 Ark. 116; Garrison v. P., 6 Neb. 274; Turner v. P., 33 Mich. 363; Bigcraft v. P., Colo. 298, 70 P. 417.

in the one a rape and in the other an assault with intent to commit rape.[86]

2. **The Charge to the Jury**—is sufficiently explained in the first volume.[87] But a reference to a few cases of rape may be convenient.[88]

3. **Verdict.**—Whether, on a count for rape, there can be a verdict for an attempt to commit it, or an assault with intent, or a simple assault, will depend on principles sufficiently explained in other connections. The result differs in our States.[89]

4. **Sentence.**—On two counts, one for rape and the other for assault with intent, a sentence for "the offense in the indictment charged" was held to be for the rape only, the inferior accusation being merged in the superior.[90]

IV. *Attempts.*

§ 976. 1. **Already**—we have considered the procedure in general for attempt and assault with intent.[91]

86. P. v. Tyler, 35 Cal. 553. See Vol. I, §§ 445, 446; Stevens v. S., 66 Md. 202, 7 A. 254.

87. Vol. II, §§ 975c-982a.

88. S. v. Johnson, 91 Mo. 439, 3 S. W. 868; Carney v. S., 118 Ind. 525, 21 N. E. 48; McQuirk v. S., 84 Ala. 435, 5 Am. St. 381, 4 So. 775; Pratt v. S., 51 Ark. 167, 10 S. W. 233; S. v. Jay, 57 Iowa, 164, 10 N. W. 343; Huston v. P., 121 Ill. 497, 13 N. E. 538; S. v. Casford, 76 Iowa, 330, 41 N. W. 32; Bethel v. C., 80 Ky. 526; Reynolds v. S., 27 Neb. 90, 20 Am. St. 659, 42 N. W. 903; Hannon v. S., 70 Wis. 448, 36 N. W. 1; S. v. Nash, 109 N. C. 824, 13 S. E. 874; Giles v. S., 83 Ga. 367, 9 S. E. 783; Anderson v. S., 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Jones v. S., 10 Tex. Ap. 552.

89. S. v. Johnston, 76 N. C. 209; Cato v. S., 9 Fla. 163; Reg. v. Neale, 1 Car. & K. 591; S. v. McLaughlin, 44 Iowa, 82; Reg. v. Nicholls, 2 Cox, C. C. 182; Fox v. S., 34 Ohio St. 377; Campbell v. P., 34 Mich. 351; Richardson v. S., 54 Ala. 158; Richie v. S., 58 Ind. 355. And see further of the verdict, C. v. Fischblatt, 4 Met. 354; Rex v. Powell, 2 B. & Ad. 75; Barrett v. S., 1 Wis. 175; Weatherford v. C., 10 Bush, 196; Bryant v. S., 114 Ga. 861, 40 S. E. 995; S. v. Steffens, 116 Iowa, 227, 89 N. W. 974; S. v. Novak, 151 Iowa, 536, 132 N. W. 26.

90. Cook v. S., 4 Zab. 843. As to Continuances,—see Reg. v. Guttridge, 9 Car. & P. 228.

Former jeopardy,—P. v. Sounders, 4 Par. Cr. 196; Rex v. Parry, 7 Car. & P. 836.

91. Ante, §§ 63-64, 67, 71 et seq., and particularly 81-83.

2. **The Indictment,**[92]—if on a statute, must fully cover the statutory terms.[93] Thus,—

3. **Age.**—Where, by the statute, the age of the female is a material element, it must be averred.[94]

§ 977. **"Feloniously"**—may be required; but this question is within explanations in the first volume.[95]

§ 978. **The Complaining Witness**—may be impeached and confirmed the same as in actual rape.[96]

§ 979. 1. **The Proofs**—should cover the entire charge.[97] Thus,—

2. **The Intent to Ravish,**—not simply to have an immoral connection, but to bring it about if necessary by the force which constitutes rape, being a necessary element in the law of attempt, must be proved to the satisfaction of the jury beyond a reasonable doubt;[98] as, it is not enough simply that the man chased the woman who was alone in

92. For forms, see Dir. & F., §§ 910-913; P. v. Girr, 53 Cal. 629.

93. Ante, § 83; Sullivant v. S., 3 Eng. 400; S. v. Martin, 3 Dev. 329; S. v. Wells, 31 Conn. 210; C. v. Thompson, 116 Mass. 346; Greer v. S., 50 Ind. 267, 19 Am. R. 709; S. v. Jaeger, 66 Mo. 173; Witherby v. S., 39 Ala. 702; P. v. O'Neil, 48 Cal. 257; S. v. Little, 37 Mo. 624; P. v. Brown, 47 Cal. 447; Curry v. S., 4 Tex. Ap. 574; Green v. S., 23 Miss. 509; P. v. McDonald, 9 Mich. 150; Dillard v. S., 3 Heisk. 260; Reg. v. Watkins, Car. & M. 264; Burke v. S., 5 Tex. Ap. 74; Joice v. S., 53 Ga. 50.

94. Reg. v. Martin, 9 Car. & P. 215.

95. Vol. II, §§ 534-536; Nevills v. S., 7 Coldw. 78; Dillard v. S., 3 Heisk. 260.

96. C. v. Kendall, 113 Mass. 210, 18 Am. R. 469; Reg. v. Walker, 2 Moody & R. 212; Rex v. Clarke, 2 Stark. 241. Many of the cases cited to the previous discussions of these questions are for the attempt.

97. Doyle v. S., 5 Tex. Ap. 442; C. v. Fitzgerald, 123 Mass. 408; Barr v. P., 113 Ill. 471; Joice v. S., 53 Ga. 50; Corley v. S. (Miss. 1911), 56 So. 179.

98. Johnson v. S., 63 Ga. 355; Krum v. S., 19 Neb. 728, 28 N. W. 278; Shields v. S., 32 Tex. Cr. 498, 73 S. W. 893; Jones v. S., 90 Ala. 628, 24 Am. St. 850, 8 So. 383; Mitchell v. S., 33 Tex. Cr. 575, 28 S. W. 475; Miles v. S., 93 Ga. 117, 44 Am. St. 140, 19 S. E. 805; P. v. Babcock, 160 Cal. 537, 117 P. 549; Amunsden v. S. (Tex. Cr. Ap.), 67 S. W. 418; Cromeans v. S., 59 Tex. Cr. Ap. 611, 129 S. W. 1129. As to assault with intent to commit rape. S. v. Jones, 145 Iowa, 176, 123 N. W. 960; S. v. Headley, 224 Mo. 177, 123 S. W. 577.

a private place;[99] or that he threw her down and choked her, then ran away.[1] But while the intent to use force is necessary, the actual use of all that is required in rape is not, and while the woman must not appear to have consented she need not have made all the resistance essential in rape.[2]

99. S. v. Donovan, 61 Iowa, 369, 16 N. W. 206.

1. Jones v. S., 18 Tex. Ap. 485. Desisting is evidence, though slight, in his favor on intent. S. v. Allison, 24 S. D. 622, 124 N. W. 747.

2. C. v. Merrill, 14 Gray, 415, 77 Am. D. 336; Rex v. Lloyd, 7 Car. & P. 318; Garrison v. P., 6 Neb. 274; S. v. Montgomery, 63 Mo. 296; Dibrell v. S., 3 Tex. Ap. 456; P. v. Brown, 47 Cal. 447; S. v. Brown, 54 Kan. 71, 37 P. 996.

For Real Estate, see Trespass to Lands, Dir & F., §§ 990-995.

CHAPTER CXLVIII.

RECEIVING STOLEN GOODS.

Consult—for the law of this offense, New Crim. Law, II, §§ 1137-1142a. For forms, with connected questions, Dir. & F., §§ 915-918. And for incidental questions, see the indexes to this series of books.

§ 979. a. 1. **Subject and how treated.**—This offense, which was a light one by the ancient common law,[3] is in all our States punishable heavily under statutes in differing terms; and the prosecution with us is under them. So that while the practitioner cannot avoid consulting carefully the enactments and decisions of his own State, this chapter, meant for use in all the States, will be limited chiefly to leading doctrines, and the citation of the authorities.

2. **How Chapter divided.**—We shall consider, I. The Procedure for the Accessorial Offense; II. The Indictment for the Substantive Offense; III. The Evidence.

I. *The Procedure for the Accessorial Offense.*

§ 980. 1. **Receiver's Relation to Thief.**—Under the ancient common law, the receiving of stolen goods was only a minor misdemeanor. But the statutes, in a large part of our States, permit the prosecuting power to treat the receiver, if it chooses, as an accessory after the fact to the thief.[4]

2. **How the Indictment**—and the rest of the procedure against such accessory should be we have already seen.[5]

3. New Crim. Law, II, § 1137 (1).

4. New Crim. Law, I, §§ 699, 700.

5. Ante, §§ 2, 5, 7-15.

For further as to the allegations and various connected questions, the reader may consult the places cited in the note.[6]

II. *The Indictment for the Substantive Offense.*

§ 981. 1. **Most of the Statutes**—either permit or require this offense to be treated as substantive,[7] not accessorial.[8]

2. **Joinder of Counts.**—If the accessorial and substantive receiving are either both felony or both misdemeanor,[9] counts laying a particular receiving as accessorial and other counts laying it as substantive, may be joined;[10] and doubtless in some of the States this is permissible where the one is felony and the other misdemeanor.[11] Or, both being thus either felony or misdemeanor, the indictment may charge the defendant in one count with the larceny of the thing, and in another with having received it knowing it to be stolen.[12]

6. Dir. & F., §§ 915-918; Bieber v. S., 45 Ga. 569; Jordan v. S., 56 Ga. 92; C. v. Cohen, 120 Mass. 198; Rex v. Hyman, 2 Leach, 925, 2 East P. C. 782; Rex v. Walkley, 4 Car. & P. 132; S. v. Larkin, 49 N. H. 39; Rex v. Drinkwater, 1 Leach, 15, 2 East P. C. 770; Rex v. Baldwin, 3 Camp. 265, Russ. & Ry. 241, 2 Leach, 982, note; P. v. Hawkins, 34 Cal. 181; C. v. Elisha, 3 Gray, 460; Reg. v. Walford, 8 Car. & P. 767; Reg. v. Casper, 2 Moody, 101, 9 Car. & P. 289; Rex v. Wheeler, 7 Car. & P. 170; Rex v. Austin, 7 Car. & P. 796; Reg. v. Ward, 2 Fost. & F. 19; Reg. v. Martin, 1 Den. C. C. 398, 3 Cox C. C. 447, 2 Car. & K. 850; C. v. Adams, 7 Gray, 43; Reg. v. Frampton, 8 Cox C. C. 16; Rex v. Hartall, 7 Car. & P. 475; Redman v. S., 1 Blackf. 429; C. v. Mullen, 150 Mass. 394, 23 N. E. 51; P. v. Kraker, 72 Cal. 459, 1 Am. St. 65, 14 P. 196; Licette v. S., 75 Ga. 253; Semon v. S., 158 Ind. 55, 62 N. E. 625.

7. New Crim. Law, I, § 696.

8. Ib. I, §§ 699, 700; Rex v. Pollard, 2 Ld. Raym. 1370.

9. Vol. I, § 444 *et seq.*

10. Rex v. Hartall, 7 Car. & P. 475; Rex. v. Austin, 7 Car. & P. 796; S. v. Richmond, 186 Mo. 71, 84 S. W. 880; P. v. Wilson, 151 N. Y. 403, 45 N. E. 862.

11. Vol. I, § 450; Stone v. Com., 24 Ky. L. 10 67 S. W. 841; Broughton v. S., 105 Ala. 103, 16 So. 912.

12. Vol. I, § 449 (7); Rex v. Galloway, 1 Moody, 234; S. v. Daubert, 42 Mo. 242; Reg. v. Sarsfield, 6 Cox C. C. 12; Reg. v. Beeton, 1 Den. C. C. 414, 2 Car. & K. 960, 3 Cox C. C. 451; S. v. Laque, 37 La. Ann. 853.

3. **The Indictment**—is given in "Directions and Forms."[13] It must duly cover the statutory terms, and conform to the principles about to be stated.[14] Thus,—

§ 982. 1. **Identifying Matter.**—As in larceny,[15] so in receiving, the transaction is identified by the description of the stolen things, and their ownership; namely,—

2. **Description.**—The thing stolen must be described in the same manner as in larceny.[16]

3. **The Name of the Thief**—is not identifying matter, so need not be alleged.[17] But if it is, to avoid a variance

13. Dir. & F., §§ 915-918.

14. Jupitz v. P., 34 Ill. 516; Cohen v. P., 5 Par. Cr. 330; Reg. v. Goldsmith (Law Rep.), 2 C. C. 225; S. v. Murphy, 6 Ala. 845; P. v. Stein, 1 Par. Cr. 202; C. v. Lakeman, 5 Gray, 82; S. v. S. L. 2 Tyler, 249; Dyer v. C., 23 Pick. 402; Reg. v. Goldsmith (Law Rep.), 2 C. C. 74, 12 Cox C. C. 479; Reg. v. Craddock, 2 Den. C. C. 31; O'Connell v. C., 7 Met. 460; Swaggerty v. S., 9 Yerg. 338; S. v. Counsil, Harper, 53; Huggins v. S., 41 Ala. 393; Reg. v. Wilson, 2 Moody, 52; Rex v. Baxter, 2 Leach, 578, 5 T. R. 83; S. v. Phelps, 65 N. C. 450; Sellers v. S., 49 Ala. 357; Kaufman v. S., 49 Ind. 248; Nourse v. S., 2 Tex. Ap. 304; U. S. v. Montgomery, 3 Saw. 544; Keefer v. S., 4 Ind. 246; P. v. Montejo, 18 Cal. 38; S. v. Hartleb, 35 La. Ann. 1180; S. v. Lane, 68 Iowa, 384, 27 N. W. 266; Holtz v. S., 30 Ohio St. 486; S. v. McLaughlin, 35 Kan. 650, 12 P. 32; S. v. Moultre, 34 La. Ann. 489; Edwards v. S., 80 Ga. 127, 4 S. E. 268; Price v. S., 21 Grat. 846; Parchman v. S., 2 Tex. Ap. 228, 28 Am. R. 435. Compare the doctrine of the last two cases with ante, § 316; Atchison v. State, 90 Ark. 457, 119 S. W. 651; Arrington v. S., 62 Tex. 357, 137 S. W. 669.

15. Ante, §§ 699, 718.

16. C. v. Campbell, 103 Mass. 436; Reg. v. Robinson, 4 Fost. & F. 43; Anonymous, 1 Crawf. & Dix, C. C. 192; Rex v. Cowell, 2 East P. C. 617; S. v. Horan, Phillips, N. C. 571; P. v. Wiley, 3 Hill, N. Y. 194; S. v. Gerrish, 78 Me. 20, 2 A. 129; Atchison v. State, 90 Ark. 457, 119 S. W. 651; Gabriel v. S., 44 Fla. 57, 32 So. 779; Stone v. Com., 24 Ky. L. 10, 67 S. W. 841; S. v. Moxley, 41 Mont. 402, 110 P. 83; S. v. Nelson, 27 R. I. 31, 60 A. 589; Brown v. S., 116 Ga. 559, 42 S. E. 795; S. v. Suppe, 60 Kan. 566, 57 P. 106; S. v. Sakowski, 191 Mo. 635, 90 S. W. 435; S. v. Hanna, 35 Ore. 195, 57 P. 629.

17. C. v. Slate, 11 Gray, 60; Rex v. Jervis, 6 Car. & P. 156; S. v. Murphy, 6 Ala. 845; Swaggerty v. S., 9 Yerg. 338; S. v. Hazard, 2 R. I. 474, 60 Am. D. 96; P. v. Caswell, 21 Wend. 86; S. v. Smith, 37 Mo. 58; Schriedley v. S., 23 Ohio St. 130; C. v. Hogan, 121 Mass. 373; S. v. Laque, 37 La. Ann. 853. And see Rex v. Thomas, 2 East P. C. 781; Rex v. Baxter, 2 East P. C. 781, 5 Tr. R. 83, 2 Leach, 578;

it must be proved.[18]

§ 983. 1. **The Owner's Name**—is essential in identification; hence to be stated if known.[19]

2. **From whom received.**—Commonly, in England and in numbers of our States, the indictment does not aver from whom the stolen goods were received.[20] Some of our American cases require it.[21] This question belongs to a class upon which there may not unreasonably be differences of opinion,[22] and perhaps it may properly be influenced by the terms of the statute.

§ 984. **The Time and Place of the Larceny**—need be neither alleged nor proved.[23] But the receiving, wherever the

Semon v. S., 158 Ind. 55, 62 N. E. 625; S. v. Moxley, 41 Mont. 402, 110 P. 83; Ream v. S., 52 Neb. 727, 73 N. W. 227.

18. C. v. King, 9 Cush. 284; Elsworthy's Case, 1 Lewin, 117; Rex v. Woolford, 1 Moody & R. 384. Contra, by the majority of the court in S. v. Coppenburg, 2 Strob. 273. See Rex v. Messingham, 1 Moody, 257; S. v. Tiedmon, 4 Strob. 300.

19. S. v. McAloon, 40 Me. 133; S. v. Williams, 2 Strob. 229; C. v. Finn. 108 Mass, 446; C. v. Maguire, 108 Mass. 469; C. v. Bowers, 3 Brews. 350; Cohen v. P., 5 Par. Cr. 330; Miller v. P., 13 Colo. 166; Lessee of Railroad may be alleged as owner, S. v. Fox, 83 Conn. 286, 76 Atl. 302. See S. v. Suppe, 60 Kan. 566, 57 P. 106.

20. 3 Chit. Crim. Law, 991; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 269, 19th Ed. 472; Archb. New Crim. Pro. 474; Jupitz v. P., 34 Ill. 516; Cohen v. P., 5 Par. Cr. 330; S. v. Murphy, 6 Ala. 845; C. v. Lakeman, 5 Gray, 82; Reg. v. Goldsmith (Lew Rep.) 2 C. C. 74; Ex parte Sullivan, 84 Neb. 493, 121 N. W. 456; Kirby v. U. S., 174 U. S. 47, 19 S. Ct. 574; S. v. Wright, 2 Pennewill, 2228, 45 A. 395; Anderson v. S., 38 Fla. 3, 20 So. 765; Semon v. S., 158 Ind. 55, 62 N. E. 625; Buechert v. S., 165 Ind. 623, 76 N. E. 111; S. v. Guild, 149 Mo. 370, 50 S. W. 909; Ream v. S., 52 Neb. 727, 73 N. W. 227; S. v. Hanna, 35 Ore. 195, 57 P. 629; Curran v. S., 12 Wyo. 553, 76 P. 577.

21. S. v. Ives, 13 Ire. 338; S. v. Beatty, Phillips, N. C. 52; S. v. Perkins, 45 Tex. 10. And see S. v. Edwards, 36 Mo. 394; S. v. Teideman, 4 Strob. 300; U. S. v. De Bare, 6 Bis. 358.

22. Compare with Stat. Crimes, §§ 1037-1040; Foster v. S., 106 Ind. 272, 6 N. E. 641.

23. Holford v. S., 2 Blackf. 103; S. v. Murphy, 6 Ala. 845; Rex. v. Stott, 2 East P. C. 780; C. v. Sullivan, 136 Mass. 170; P. v. Smith, 94 Mich. 644, 54 N. W. 487; P. v. Goldberg, 39 Mich. 545; Hester v. S., 103 Ala. 83, 15 So. 857; S. v. Crawford, 39 S. C. 343, 17 S. E. 799.

original stealing was, must be charged as in the county of the indictment.[24]

§ 985. **The Value,**—if the punishment depends on it, must be stated; otherwise, it need not be,[25]—the rule being the same as in larceny.[26]

§ 986. **Guilty Knowledge**—is the gist of the offense, so it must be averred and proved.[27] And where, by statute, the offense consists of receiving the goods "knowing the same to be stolen, *with intent to defraud the owner,*" this fraudulent intent must also be alleged.[28]

§ 987. **Where Goods of Different Owners**—are received in the one transaction, all may be charged in one count; the rule in larceny applying.[29]

§ 988. 1. **If Two Persons,**—in a single count, are charged, not under a *separaliter*,[30] with receiving stolen goods, one may be convicted and the other acquitted,[31] but not both convicted unless the receiving was joint.[32] And after evidence of a receiving by one, if that tendered as to the other

24. Allison v. C., 83 Ky. 254; Licette v. S., 75 Ga. 253; Ex parte Sullivan, 84 Neb. 493, 121 N. W. 456.

25. Sawyer v. P., 3 Gilman, 53; S. v. Watson, 3 R. I 114; O'Connell v. C., 7 Met. 460; P. v. Rice, 73 Cal. 220, 14 P. 851. See Engster v. S., 11 Neb. 539, 10 N. W. 453; S. v. Moxley, 41 Mont. 402, 110 P. 83. Verdict of guilty implies a finding of value, S. v. Fox, 83 Conn. 286, 76 Atl. 302.

26. Ante, § 713.

27. Rex v. Kernon, 2 Russ. Crimes (3d Eng. Ed.) 251; Reg. v. Larkin, Dears. 365, 26 Eng. L. & Eq. 572; Blackshare v. S., 94 Ark. 548, 128 S. W. 549; Stripling v. S., 114 Ga. 843, 40 S. E. 993; Semon v. S., 158 Ind. 55, 62 N. E. 625; P. v. Rosenthal, 197 N. Y. 394, 90 N. E. 991; S. v. Winter, 83 S. C. 25, 65 S. E. 243. Compare Anderson v. S., 130 Ala. 126, 30 So. 375; S. v. Sakowski, 191 Mo. 635, 90 S. W. 435; P. v. Hartwell, 166 N. Y. 361, 59 N. E. 929; S. v. Moyer, 209 Mo. 391, 107 S. W. 1085; S. v. Bannister, 79 Vt. 524, 65 A. 586.

28. Pelts v. S., 3 Blackf. 28. And see Hurell v. S., 5 Humph. 68; Darrah v. S., 65 Neb. 201, 90 N. W. 1123.

29. S. v. Nelson, 29 Me. 329.

30. Vol. II, §§ 473-476.

31. C. v. Slate, 11 Gray, 60; S. v. Smith, 37 Mo. 58. The like rule prevails in a civil action for a tort. Nicoll v. Glennie, 1 M. & S. 588.

32. Vol. II, § 1037, note; Rex. v. Messingham, 1 Moody, 257. It is now otherwise in England by statute. Reg. v. Reardon (Lew Rep.) 1 C. C. 31, 32, 33; s. c. nom. Reg. v. Rearden, 10 Cox C. C. 241.

relates to a different transaction, counsel should object, and the court will either exclude it or compel the prosecutor to elect on which transaction, or against which defendant, he will ask for a verdict. For one, not both, may be convicted.[33] Or judgment may be given against the one who received first in the order of time.[34]

2. **On a Charge of Theft,**—there can be no conviction for receiving.[35] Nor on a charge of receiving can there be a conviction of larceny.[36]

III. *The Evidence.*

§ 988 a. **Witnesses.**—The owner of the stolen goods,[37] the thief,[38] and the like,[39] are competent against the receiver.

§ 989. **Possession**—of the goods may, as in larceny,[40] and under the like rules and with the like effect, be evidence against the receiver.[41] But the proper accompanying proofs

33. Rex v. Messingham, supra; Rex v. Dann, 1 Moody, 424; Reg. v. Matthews, 1 Den. C. C. 596, 4 Cox C. C. 214; Reg. v. Hayes, 2 Moody & R. 155, 156; S. v. Sartino, 216 Mo. 408, 115 S. W. 1015.

34. Reg. v. Dovey, 2 Den. C. C. 86, 4 Cox, C. C. 428, 2 Eng. L. & Eq. 532; Reg. v. Matthews, 1 Den. C. C. 596; Reg. v. Dring, Dears. & B. 329.

Husband and Wife. How, where husband and wife are thus jointly charged, see Rex v. Archer, 1 Moody, 143.

35. Brown v. S., 15 Tex. Ap. 581; Chandler v. S., 15 Tex. Ap. 587. But see Vincent v. S., 10 Tex. Ap. 330.

36. S. v. Hoing, 9 Mo. Ap. 298.

37. Gassenheimer v. S., 52 Ala. 313.

38. Rex v. Haslam, 1 Leach, 418, 2 East P. C. 782; S. v. Coppenburg, 2 Strob. 273; Atchison v. S., 90 Ark. 457, 119 S. W. 651; S. v. Rom, 77 N. J. Law 248, 72 A. 431. Declarations by him in absence of defendant relating solely to the larceny and not to the recovery are competent. Atchison v. S. (Mo. 1909), 119 S. W. 405.

39. C. v. Savory, 10 Cush. 535; Redman v. S., 1 Blackf. 429.

40. Ante, §§ 739-747; Territory v. Doyle, 7 Mont. 24.

41. Reg. v. Deer, Leigh & C. 240; Reg. v. Matthews, 1 Den. C. C. 596, 601, 4 Cox C. C. 214; Wills v. P., 3 Par. Cr. 473; Reg. v. Hobson, Dears. 400, 6 Cox C. C. 410, 33 Eng. L. & Eq. 525; Adams v. S., 52 Ala. 379; S. v. Turner, 19 Iowa, 144; Reg. v. Laugher, 2 Car. & K. 225; S. v. Wallace, 47 Iowa, 660; O'Connell v. S., 55 Ga. 296; Reg. v. Nicolls, 1 Fost. & F. 51; Arispe v. S., 26 Tex. Ap. 581; P. v. Con-

must appear, or it will amount to nothing.[42] So—

§ 990. **Other Receivings**—may, as evidence of guilty knowledge, be shown against the defendant, within the rules[43] familiar in this class of questions.[44] They are not in all circumstances admissible.[45] The cases on this question seem not entirely harmonious, but its further consideration may be remitted to the elucidations in the previous volume.[46]

§ 991. **Guilty Knowledge**—is an important element in these cases, and it may be shown by various other proofs.[47] Competent, for example, are the evil reputation of the person from whom the goods were received,[48] the purchase or sale of them by the defendant for less than their value,[49] his failure to make reasonable explanations,[50] his concealing of them,[51] and the like.

nor, 68 Hun, 78; Friedberg v. P., 102 Ill. 160; S. v. Record, 151 N. C. 695, 65 S. E. 1010.

42. Durant v. P., 13 Mich. 351, 353; Reg. v. Langmead, Leigh & C. 427. It must be shown the goods were stolen. S. v. Moxley, 41 Mont. 402, 110 P. 83.

43. Vol. II, §§ 1120-1129.

44. Devoto v. C., 3 Met. (Ky.) 417; P. v. Rando, 3 Par. Cr. 335; Shriedley v. S., 23 Ohio St. 130; Coleman v. P., 58 N. Y. 555; Copperman v. P., 56 N. Y. 591; Coleman v. P., 55 N. Y. 81; C. v. Josnson, 133 Pa. 293, 19 A. 402; C. v. Charles, 14 Philad. 663; S. v. Jacob, 30 S. C. 131, 14 Am. St. 897, 8 S. E. 698; Premack v. S., 30 Ohio Cir. Ct. R. 328; Lipey v. P., 227 Ill. 364, 81 N. E. 348; Benchert v. S., 165 Ind. 523, 76 N. E. 111; Goldsberry v. S., 66 Neb. 312, 92 N. W. 906; Com. v. Johnson, 133 Pa. St. 293, 199, 402; S. v. Crawford, 39 S. C. 343, 17 S. E. 199.

45. Reg. v. Oddy, 2 Den. C. C. 264, 5 Cox, C. C. 210, 4 Eng. L. & Eq. 572; McIntire v. S., 10 Ind. 26.

46. And see Rex v. Davis, 6 Car. & P. 177; Rex v. Dunn, 1 Moody, 146, 150; Reg. v. Mansfield, Car. & M. 140.

47. Reg. v. Drage, 14 Cox C. C. 85; Jupitz v. P., 34 Ill. 516; C. v. Jenkins, 10 Gray, 485; S. v. Wallace, 47 Iowa, 660; Murio v. S., 31 Tex. Cr. 210, 20 S. W. 356; Pat v. S., 116 Ga. 92, 42 S. E. 389; Pickering v. U. S., 2 Okla. Cr. Ap. 197, 101 P. 123. Verdict should contain finding as to knowledge, P. v. Tilley, 135 Cal. 61, 67 P. 42.

48. C. v. Gazzolo, 123 Mass. 220, 25 Am. R. 79; Com. v. Billings, 167 Mass. 283, 45 N. E. 910. Or any circumstances from which he, as a reasonable man, would have concluded the goods were stolen, S. v. Weiner (Conn. 1911), 80 A. 198.

49. Andrews v. P., 60 Ill. 354; Wills v. P., 3 Par. Cr. 473.

50. Collins v. S., 33 Ala. 434, 73 Am. D. 426.

51. Adams v. S., 52 Ala. 379. And his conduct in general before

§ 991 a. **Ownership**—should be proved as laid.[52]

and after receiving the goods, S. v. Weiner (Conn. 1911), 80 A. 198. Evidence of an agreement between the thief and defendant in regards to a certain kind of property. Anthony v. S., 44 Fla. 1, 32 So. 818. Duty of accused to make diligent inquiry, P. v. Rosenthol, 197 N. Y. 394, 90 N. E. 991 affirming 118 N. Y. Sup. 1132. Vanimmons v. S., 12 O. C. D. 345, 22 Ohio Ct. R. 451. Evidence to identify the goods or money stolen with goods or money in the hands of accused recovered, Polin v. S., Tex. 65 S. W. 183.

52. O'Connell v. S., 55 Ga. 296; Brooks v. S., 5 Bax. 607; Owen v. S., 52 Ind. 379. And see Reg. v. Sarsfield, 6 Cox, C. C. 12.

For Religious Worship, see Disturbing Meetings; Rescue, see Prison Breach, etc.; Resisting Officer, see Obstructing Justice and Government.

CHAPTER CXLIX.

RIOT.

Consult—for the law of this offense, New Crim. Law, II, §§ 1143-1155. For the indictment and related questions, Dir. & F., §§ 924-930. And see the indexes to this series of books. Compare, in the various volumes, with AFFRAY, RIOT, UNLAWFUL ASSEMBLY, PRIZE-FIGHTING.

§ 992. 1. **Rout**[53]—is practically merged in riot, and it will not require a separate consideration in this volume.

2. **Indictment for Riot**—To constitute this offense, there must be, 1. an assemblage, 2. consisting of three or more persons, and, 3. a disorderly act performed by them of a sort calculated to terrify others.[54] The allegations may be that on, etc., at, etc., the defendants, naming them, "together with divers other evil-disposed persons, to the number of ten and more, to the jurors unknown," "unlawfully, riotously, and routously did assemble and gather together, to disturb the peace," etc.; proceeding to set forth the act performed; as, that they, then and there, in and upon X, "then and there being, unlawfully, riotously, and routously did make an assault, and her the said X then and there unlawfully, riotously, and routously did beat, wound, and ill-treat," etc.; concluding "to the great disturbance and terror," etc.[55] And—

53. New Crim. Law, II, § 1183.

54. Ib. § 1143; Simmons v. Ter., 11 Okla. 574, 69 P. 787; Dixon v. S., 105 Ga. 787, 31 S. E. 750; Tripp v. S., 109 Ga. 489, 34 S. E. 1021; Coney v. S., 113 Ga. 1060, 39 S. E. 425; Turner v. S., 120 Ga. 850, 48 S. E. 312; S. v. Mizis, 48 Ore. 165, 85 P. 611; rehearing denied, 48 Ore. 165, 86 P. 861.

55. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 590, 591, 19th Ed. 900; Dir. & F., § 929; S. v. Russell, 45 N. H. 83; C. v. Gibney, 2 Allen, 150; Rex v. Haigh, 31 How. St. Tr. 1092, 1093; Rex v. Penn. 6 How. St. Tr. 951, 954; Rex v. Sacheverll, 10 How. St. Tr. 30; S. v. Martin, 3 Murph. 533; S. v. Dillard, 5 Blackf. 365; Blackwell v. S., 30 Tex. Ap. 672; S. v. Sims, 16 S. C. 486; City of Cherryvale v. Hawman, 80 Kan. 170, 101 P. 994. Under statute, Proctor v. S., 5 Okla. Cr. 553, 115 P. 630.

3. **On a Statute,**—the indictment must adequately pursue its terms.[56]

§ 993. The Terrifying Act—will not always be an assault; but, whatever, it is, in principle it should be specifically charged.[57] Yet—

§ 994. Contrary Dictum—("Other Persons").—In seeming contradiction to this, Lord Holt is reported to have said: "An indictment against J. S., for that he *cum multis aliis*, at H, in such a county, did commit a riot, is good."[58] But if we assume the report to be correct, perhaps his meaning was simply that the indictment is good against one only, *cum multis aliis*.

§ 995. Purpose of Assemblage.—Though, in law, people lawfully together may commit riot, still the assemblage must first become unlawful; that is, the riotous purpose must be entertained.[59] Hence the unlawfulness of the assemblage must in some way appear in allegation;[60] and there is no better form for this than to charge it to be to disturb the peace,[61]—an expression sufficiently definite to satisfy the law, yet not so narrow as to forebode a variance. Still any other setting out from which the unlawful purpose will appear to the judicial understanding will be legally adequate.[62] It was once held insufficient to say

56. S. v. Kutter, 59 Ind. 572; Mackaboy v. C., 2 Va. Cas. 268; S. v. Berry, 21 Mo. 504; Reg. v. Pugh, 6 Mod. 140; Lock v. S., 122 Ga. 730, 50 S. E. 932; Carter v. S., 7 Ga. Ap. 44, 65 S. E. 1072.

57. And see ante, § 17; S. v. Dillard, 3 Blackf. 365; post, § 996; Reg. v. Soley, 11 Mod. 100, 2 Salk. 594, post, § 995; S. v. Sims, 16 S. C. 486. See Green v. S., 109 Ga. 536, 35 S. E. 97.

As to Convicting Assault—on a charge of riot, see Price v. P., 9 Bradw. 36. It seems to me, on principle, that there can be a conviction for assault or not according as the assault is, or not, duly charged in the indictment.

58. Anonymous, Holt, 635, 3 Salk. 317. See post, § 998.

59. New Crim. Law, II, § 1150.

60. C. v. Gibney, 2 Allen, 150; Aron v. City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

61. Ante, § 992 (2); S. v. Renton, 15 N. H. 169, 172.

62. McWaters v. S., 10 Mo. 167. In 1 Russ. Crimes (3d Ed.) 287, it is said the indictment "must show for what act the rioters assembled, that the court may judge whether it is unlawful or not. Reg. v. Gulston, 2 Ld. Raym. 1210. And it must

that the defendants unlawfully, riotously, and routously assembled themselves together, and hindered the members of a corporation from electing a bailiff; for an unlawful purpose, and an unlawful act committed, are essential in allegation.[63] Hence,—

§ 996. **The Facts,**—as already assumed,[64] should be set forth, and with reasonable fulness. In one case, "the charge is," said the court, "that the defendants made a great noise and disturbance of the peace. This, the court considers, is too vague and uncertain. In criminal proceedings the charge should be distinct and positive; and the way and manner in which the great noise and disturbance of the peace was made, should have been stated."[65]

state that the defendants unlawfully assembled; for a riot is a compound offense; there must be, not only an unlawful act to be done, but an unlawful asembly of more than two persons. Reg. v. Soley, 11 Mod. 100, 2 Salk. 594." And see Blackwell v. S., 30 Tex. Ap. 672, 18 S. W. 676.

63. Reg. v. Soley, supra.

64. Ante, § 993.

65. Whitesides v. P., Breese, 4. See Bankus v. S., 4 Ind. 114. An indictment alleging the assembling of the defendants in a riotous, etc. manner, making a great noise and disturbance near the dwelling-house of B, and calling him and his wife persons of color, with vulgar and opprobrious epithets, yet not averring that B and his wife were in the house, was adjudged ill. Said Nash, J.: "The gist of the offense consists in the defendants using such force and violence as amounted to a breach of the peace; and the law requires that in indictments of this kind the facts should be so charged as to show a breach of the peace, or acts directly tending to it, and not a mere civil trespass. . . . Men may be guilty of a riot in assembling together, to the number of three or more, and in a tumultuous and violent manner breaking into a house, or demolishing it, or otherwise injuring it, though neither the owner nor any of his family be present; for that is, in itself, a breach of the public peace; but the essence of the charge here is, not for any violence done to the dwelling-house, but for riotously disturbing the owner in quiet and peaceable possession of it, and the charge is not made with sufficient legal certainty unless it appear, upon the face of the indictment, that the owner or his family were present to be so disturbed." S. v. Hatchcock, 7 Ire. 52, 53, 54. An allegation in substance that the defendants "riotously, routously and unlawfully gathered and assembled together, and then and there did riotously, etc., make a great noise, tumult, and disturbance, to the terror of the citizens, contrary," etc., was held to be good, etc., S. v. Voshall, 4 Ind. 589;

§ 997. **The Conclusion "To the Terror," etc.**—it is practically best to preserve. Yet not always is it necessary; or, at least, the idea may be otherwise sufficiently conveyed. The Tennessee court deemed it essential only where the gist of the offense is the terror actually created, not where the acts of the defendants were otherwise unlawful.[66] And in South Carolina this conclusion is unnecessary after the charge of the actual perpetration of a deed of violence.[67]

§ 998. 1. **That there were three or more Persons**—guilty of the riot must in some way appear in allegation, in the proofs, and in the verdict.[68] And—

2. **Joining them.**—The rule, in this class of offenses, is that the proceeding is equally good whether against all or less than all, even against one,—that one may be convicted, however many are indicted and tried,—but that, at each step, in the allegation, in the proofs, and in the verdict, the joint participation of not less than the legal number of three must in some way be manifest.[69] As to—

3. **Names of Concurring Persons.**—The allegation may be that the defendants "and others," etc., as already explained.[70] But in this case, if the names of the "others" are known, they must be mentioned, "others unknown" being admissible only where the names are unknown in fact.[71]

§ 999. 1. **The Entire Allegation**—should be constructed after the approved rules of criminal pleading. Thus,—

Green v. S., 109 Ga. 536, 35 S. E. 97; Baptist v. S., 109 Ga. 546, 35 S. E. 658.

66. S. v. Whitesides, 1 Swan (Tenn.) 88. And see C. v. Runnels, 10 Mass. 518, 6 Am. D. 148; New Crim. Law, II, § 1147 (3).

67. S. v. Sims, 16 S. C. 486;

68. New Crim. Law II, §§ 1143-1146; Martin v. S., 115 Ga. 255, 41 S. E. 576; Moore v. S., 115 Ga. 259, 41 S. E. 578 holding that one may be convicted and the others acquitted.

69. Vol. II, §§ 1023, 1036; ante, §§ 34 (2), 26, 225; S. v. Blair, 13 Rich. 93; C. v. Berry, 5 Gray, 93. One tried separately and convicted cannot complain that another is convicted, nor can judgment be arrested, Simmons v. Ter., 11 Okla. 574, 69 P. 787.

70. Ante, §§ 992 (2), 994; S. v. Blair, supra.

71. S. v. Brazil, 1 Rice, 257; Thayer v. S., 11 Ind. 287; S. v. O'Donald, 1 McCord, 532; S. v. Calder, 2 McCord, 462.

2. **Owner's Name.**—If the riotous acts are the pulling down of a dwelling-house, the name of its owner should be averred.[72] And—

3. **Disturbing Election.**—An indictment for riotously entering the guildhall of a borough, and preventing the burgesses from electing a bailiff, must show their authority to make the election.[73]

4. **Inciting to Riot.**—The gist of Chitty's averments for this offense is that A, etc., on, etc., at, etc., "unlawfully, wickedly, and maliciously devised and endeavored as much as in him lay to raise and create insurrections, riots, and tumults," etc., and that then and there he "unlawfully, wickedly, and maliciously incited, encouraged," etc., and "endeavored and labored to persuade, instigate, and prevail on divers liege subjects," etc., "unlawfully, riotously, and tumultuously to assemble and gather together to disturb the peace, etc., and to injure and annoy a great number of peaceable subjects," etc., going on to specify the acts done.[74]

§ 1000. 1. **The Declarations**—of persons engaged in a riot, even of a single one of them, are competent evidence against all.[75]

2. **Former Jeopardy for Assault.**—If an assault is the *gravamen* of the riot, one who has been convicted of it cannot afterward be prosecuted for the riot.[76] This is evidently the true rule, though there are cases not quite in harmony with it.[77] But the question is for "New Criminal Law."[78]

72. S. v. Martin, 3 Murph. 533.

73. Reg. v. Soley, 11 Mod. 115.

74. 2 Chit. Crl. Law, § 506. And see McRae v. S., 71 Ga. 96.

75. Gallaher v. S., 101 Ind. 411; McRae v. S., 71 Ga. 96. Evidence to prove "red flag" is emblem of anarchy. P. v. Burman, 154 Mich. 150, 117 N. W. 589.

76. Winneger v. S., 13 Ind. 540.

77. Freeland v. P., 15 Ill. 380. See Hurd v. Stanly, 2 Root, 186, 187.

78. New Crim. Law, II, § 1154, and the places there cited.

For River, see Way; Road, see Way.

CHAPTER CL.

ROBBERY.

Consult—for the law of this offense, New Crim. Law, II, §§ 1156-1182. For the indictment and connected topics, Dir. & F., §§ 931-938. For miscellaneous questions see the indexes to this series of books.

§ 1001. **Allege and Prove.**—The elements of this offense, to be averred and proved, are—

1. A larceny,
2. Wherein the asportation is from the person, and is
3. Effected by force or by putting in fear.[79] Hence—

§ 1002. 1. **The Indictment**—should contain the allegations for simple larceny,[80] with the added matter that makes the larceny robbery.[81] It is common to say that on, etc., at, etc., the defendant "in and upon one X feloniously did make an assault, and him the said X in bodily fear and danger of his life then and there feloniously did put, and one, etc. [setting out the things taken and their values as in simple larceny],[82] of the moneys, goods, and chattels of the said X, from the person and against the will of the said X, then and there feloniously and violently did steal, take, and carry away."[83]

79. New Crim. Law, II, § 1156 et seq.; and particularly §§ 1156, 1161, 1166, 1169, 1170, 1174; C. v. White, 133 Pa. 182, 19 Am. St. 628, 19 A. 350; Clements v. S., 84 Ga. 660, 20 Am. St. 385, 11 S. E. 505; P. v. Boyd, 16 Cal. Ap. 130, 116 P. 323; P. v. Scarbak, 245 Ill. 435, 92 N. E. 286; P. v. Nolan, 250 Ill. 351, 95 N. E. 140.

80. Ib. 1159; Rains v. S., 137 Ind. 83, 36 N. E. 532; Keeton v. S., 70 Ark. 163, 66 S. W. 645.

81. Dir. & F. 932.

82. C. v. Cahill, 12 Allen, 540; McEntee v. S., 24 Wis. 43, 46; C. v. Green, 122 Mass. 333; Wesley v. S., 61 Ala. 282; Arnold v. S., 52 Ind. 281, 21 Am. R. 175. Description of property, P. v. Nolan, 250 Ill. 351, 95 N. E. 140.

83. Matthews Crim. Law, 471; Archb. Crim. Pl. & Ev. (19th Ed.) 456; Dir. and F., § 933; McEntee v. S., 24 Wis. 43; S. v. Chapman, 6 Nev. 320; Hardy v. C., 17 Grat. 592; S. v. Gorham, 55 N. H. 152; Stegar v. S., 39 Ga. 583, 99 Am. D.

2. **In Statutory Robbery,**—the terms of the statute must be duly followed. And where it is aggravated, as by being in a highway, or by the defendant being armed with a dangerous weapon, or the like, such added fact must be averred.[84]

§ 1003. "Feloniously,"—which is necessary because robbery is felony,[85] is, in the foregoing form, applied to the assault, repeated to the putting in fear, and again to the larceny. Probably the first only is strictly necessary, its force reaching onward and qualifying all.[86] It will not thus extend backward; so that if the assault is not charged as felonious, yet further on the putting in fear is, it will be ill.[87]

472; S. v. Cook, 20 La. Ann. 145; S. v. Kegan, 62 Iowa, 106, 17 N. W. 179; Toliver v. S., 142 Ala. 3, 38 So. 801; In re Myrtle (Cal. Ap.) 94 P. 335; Rasberry v. S., 4 Okla. Cr. Ap. 613, 103 P. 865; S. v. La Chall, 28 Utah, 80, 77 P. 3; S. v. Smith, 40 Wash. 615; S. v. Wilson, 40 Wash. 703, 82 P. 919 holding "carried away" not necessary.

84. Dir. & F., §§ 934-936; Archb. Crim. Pl. & Ev. (19th Ed.) 450, 456; 3 Chit. Crim. Law, 806, 807; Collins v. P., 39 Ill. 233; C. v. Clifford, 8 Cush. 215; Quinlan v. P., 6 Par. Cr. 9; C. v. Mowry, 11 Allen, 20; U. S. v. Mills, 7 Pet. 138; Chappell v. S., 52 Ala. 359; P. v. Loop, 3 Par. Cr. 559; Reg. v. Norton, 8 Car. & P. 671; S. v. Scott, 39 Mo. 424; S. v. Howerton, 59 Mo. 91; S. v. Burke, 73 N. C. 83; Anderson v. S., 28 Ind. 22; Wilson v. S., 3 Tex. Ap. 63; Reardon v. S., 4 Tex. Ap. 602; Acker v. C., 94 Pa. 284; S. v. Swafford, 3 Lea, 162; Clary v. S., 33 Ark. 561; P. v. Calvin, 60 Mich. 113, 26 N. W. 851; S. v. Ready, 44 Kan. 697, 26 P. 58; C. v. Griffiths, 126 Mass. 252; S. v. Burnett, 81 Mo. 119; Wesley v. S., 61 Ala. 282; S. v. Segermond, 40 Kan. 107, 10 Am. St. 169, 19 P. 370; P. v. Ah Sing, 95 Cal. 654, 30 P. 796; S. v. Brown, 113 N. C. 645, 18 S. E. 51; Williams v. S., 10 Tex. Ap. 8; S. v. Brewer, 53 Iowa, 735, 6 N. W. 62; S. v. Jackson, 26 W. Va. 250; S. v. Leighton, 56 Iowa, 595, 9 N. W. 896; Trimble v. S., 16 Tex. Ap. 115; P. v. Hicks, 66 Cal. 103, 4 P. 1093; S. v. Burke, 73 N. C. 83; Burns v. S., 12 Tex. Ap. 269; P. v. Boyd, 16 Cal. 130, 116 P. 323; Harris v. S., 1 Ga. Ap. 136, 57 S. E. 937. Immediate danger to the person, to be alleged under a Mississippi statute. Webb. v. S. (Miss. 1911), 55 So. 356. Dangerous weapon, see P. v. DuVeau, 94 N. Y. S. 225.

85. Vol. II, 534-537; Triplett v. Com., 122 Ky. 35, 43, 91 S. W. 281.

86. Ante, § 547; S. v. Brown, 104 Mo. 365, 370, 16 S. W. 406.

87. Rex v. Pelfryman, 2 Leach, 563, 2 East, P. C. 783.

§ 1004. 1. **Violence,**—in the definition,[88] is not a technical word; therefore an indictment without it may be good, if the same meaning is otherwise conveyed.[89] So, also,—

2. "**Rob**" is not essential.[90]

§ 1005. **Putting in Fear**—is an alternative element in the offense, essential only when there is no force.[91] So that on principle, the indictment should allege either the fear or the force, but it need not both.[92] On authority, "it does not appear certain," says East, that the fear should be added to the force in averment; "though this is usual, and therefore safest to be done. But in the conference on Donolly's case,[93] where this subject was much considered, it was observed by Eyre, B., that the more ancient precedents did not state the putting in fear; and that though others stated the putting in corporal fear, yet the putting in fear of life was of modern introduction. Other judges considered that the gist of the offense was the taking, etc., by violence, and that the putting in fear was only a constructive violence, supplying the place of actual force."[94]

§ 1006. 1. **From the Person.**—The averment that the taking was from the person of the one robbed is essential.[95]

88. New Crim. Law, II, § 1156.

89. Rex v. Smith, 2 East, P. C. 783. See, Craig v. S., 157 Ind. 574, 62 N. E. 5.

90. S. v. Robinson, 29 La. Ann. 364; S. v. Ready, 44 Kan. 697. As that a person is wrongly designated. P. v. Hewner, 13 Cal. Ap. 768, 114 P. 411.

91. Ante, § 1001. Henderson v. S., 1 Ala. Ap. 154, 55 So. 816.

92. And see Chappell v. S., 52 Ala. 359; Traver v. S., 72 Ark. 524, 81 S. W. 615; P. v. Howard, 3 Cal. Ap. 36, 84 P. 462; Blanton v. Com., 22 Ky. L. 515, 58 S. W. 422; Cunningham v. S. (Miss. 1900), 28 So. 750; S. v. Davis, 28 Utah, 10, 76 P. 705; S. v. Lawler, 130 Mo. 366, 371, 32 S. W. 579; S. v. Stinson, 124 Mo. 447, 448, 27 S. W. 1098; S. v. Paisley, 36 Mont. 237, 92 P. 566.

93. Rex v. Donolly, 2 East, P. C. 715, 719. The kind of fear need not be alleged P. v. Clancy, 20 Mont. 498, 52 P. 267; S. v. Sanders, 14 N. D. 203, 206, 103 N. W. 419; see contra. Slover v. Ter., 5 Okla. 506, 49 P. 1009.

94. 2 East, P. C., 783. See New Crim. Law, II, § 1174; Lampkin v. S., 87 Ga. 516; Coffelt v. S., 27 Tex. Ap. 608, 11 Am. St. 205; Dill v. S., 6 Tex. Ap. 113; C. v. Donahue, 148 Mass. 529, 20 N. E. 171; S. v. Brown, 113 N. C. 645, 18 S. E. 51.

95. Kit v. S., 11 Humph. 167; P. v. Beck, 21 Cal. 385; Stegar v. S., 39 Ga. 583, 99 Am. D. 472; Henderson v. S., 1 Ala. Ap. 154, 55 So. 816; P. v.

It does not suffice to say simply taken from him.[96]

2. **"Against his Will."**—That it was against his will has been also deemed by some necessary in allegation.[97] But evidently, in this part of the indictment, what is adequate in larceny is so also in robbery; and this negation of consent can be required only where, without it, the terms of a statute will not be duly covered.[98] Hence it has been well held to be unnecessary.[99] And—

3. **Ownership**—must be alleged and proved, precisely as in larceny.[1] So—

4. **Value.**—The rules in larceny[2] apply also to value; but, since value does not commonly affect the punishment, contrary to the common course in larceny it need not ordinarily be alleged or proved.[3]

§ 1007. **The Felonious Intent**—requires the same allegations and proofs as in larceny.[4]

HoSing, 6 Cal. Ap. 752, 93 P. 204; P. v. Ah Sing, 95 Cal. 654, 30 P. 796; Breckenbridge v. Com., 97 Ky. 267, 271, 30 S. W. 634; Smith v. S., 82 Miss. 793, 796, 35 So. 178; S. v. Lawler, 130 Mo. 366, 372, 32 S. W. 979.

96. S. v. Leighton, 56 Iowa, 595, 9 N. W. 896.

97. Kit v. S., supra.

98. Ante, § 752a. And see Chappell v. S., 52 Ala. 359; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 257, referring to Rex v. McDaniel, Foster, 121, 128.

99. Terry v. S., 13 Ind. 70; S. v. LaChall, 28 Utah, 80, 77 P. 3; S. v. Patterson, 42 La. Ann. 934, 8 So. 529; S. v. Kegan, 62 Iowa, 106, 17 N. W. 179; S. v. Pressley, 91 Miss. 377, 381, 44 So. 827; P. v. Riley, 75 Cal. 98, 16 P. 544; S. v. Patterson, 42 La. Ann. 934, 82 So. 529.

1. New Crim. Law, II, § 1159 (1); P. v. Vice, 21 Cal. 344; Smedly v. S., 30 Tex. 214; Brooks v. P., 49 N. Y. 436, 10 Am. R. 398; Crews v. S., 3 Coldw. 350; S. v. Nelson, 11 Nev. 334; S. v. Ah Loi, 5 Nev. 99; P. v. Nelson, 56 Cal. 77; Clark v. S., 28 Tex. Ap. 189, 19 Am. St. 817; McGinnis v. S., 16 Wyo. 72, 91 P. 936. Contra by statute, S. v. Eddy, 46 Ore. 625, 81 P. 941.

2. Vol. II, § 488b (23), 540, 541, 567.

3. S. v. Perley, 86 Me. 427, 433, 41 Am. St. 564, 30 A. 74; S. v. Brown, 113 N. C. 645, 18 S. E. 51. See C. v. White, 133 Pa. 182, 19 Am. St. 628, 19 A. 350; S. v. Brache, 63 Wash. 396, 115 P. 853; P. v. Chuey Ying Git, 100 Cal. 437, 34 P. 1080; S. v. La Chall, 28 Utah, 80, 77 P. 3; P. v. Stevens, 141 Cal. 488, 75 P. 62.

4. Reg. v. Hemmings, 4 Fost. & F. 50; Chappell v. S., 52 Ala. 359; S. v. Hollyway, 41 Iowa, 200, 20 Am. R. 586; S. v. Sowls, Phillips, N. C. 151; C. v. White, 133 Pa. 182, 19 Am. St. 628, 19 A. 350; Henderson v. S., 1 Ala. Ap. 154, 55 So. 816; S. v.

§ 1007 a. 1. **Declarations of the Person Robbed,**—when of the *res gestae,*[5] are admissible in evidence;[6] otherwise when not of the *res gestae.*[7]

2. **The Identity**—of the defendant and the robber must be shown.[8]

3. **Dying Declarations**—are not admissible.[9]

4. **The Evidence**—may assume other forms;[10] as,—

5. **The Character for Honesty**—of one jointly indicted with the defendant, yet not on trial, cannot be brought forward by him.[11]

6. **The Declarations of Co-conspirators**—are within the ordinary rules on the subject.[12]

7. **The Tools and Fruits of the Crime**—may be introduced and testified to the same as in other offenses.[13]

§ 1008. **Attempts,**—including assaults with intent to rob, may assume various forms; but the procedure requires no special elucidations in this place.[14] It was adjudged

Gill, 21 Mont. 151, 53 P. 184; S. v. Fordham, 13 N. D. 494, 101 N. W. 888; Keeton v. S., 70 Ark. 163, 66 S. W. 645; S. v. Kegan, 62 Iowa, 106, 17 N. W. 179; Smith v. S., 72 Neb. 345, 100 N. W. 806.

5. Ante, §§ 625-627, 633, and places there referred to.

6. S. v. Ah Loi, 5 Nev. 99; Rex v. Wink, 6 Car. & P. 397.

7. Moses v. S., 88 Ala. 78, 16 Am. 78, 16 Am. St. 21, 7 So. 101.

8. C. v. Tolliver, 119 Mass. 212; C. v. Fagan, 108 Mass. 471. Sufficiency of proof of identity. Lewis v. S., 165 Ala. 83, 51 So. 308; Booton v. S., 86 Neb. 114, 125 N. W. 144.

9. Vol. II, § 1207; Rex v. Lloyd, 4 Car. & P. 233.

10. Rex v. Winkworth, 4 Car. & P. 444; P. v. Morrigan, 29 Mich. 4; C. v. Watson, 109 Mass. 354; Driscoll v. P., 47 Mich. 413; Clark v. S., 28 Tex. Ap. 189, 19 Am. St. 817; Odle v. S., 13 Tex. Ap. 612; S. v. Lucas, 57 Iowa, 501, 10 N. W. 868.

11. Walls v. S., 125 Ind. 400.

12. Vol. II, § 1248 (2); Clark v. S., 28 Tex. Ap. 189, 19 Am. St. 817; S. v. Greenwade, 72 Mo. 298.

13. P. v. Sansome, 84 Cal. 449, 24 P. 143; P. v. Becker, 48 Mich. 43, 11 N. W. 779; Rogers v. S., 32 Tex. Cr. 447, 24 S. W. 282; S. v. Bulla, 89 Mo. 595, 1 S. W. 764; P. v. Collins, 64 Cal. 293, 30 P. 847; P. v. Whitson, 43 Mich. 419, 5 N. W. 454; Clark v. S., 28 Tex. Ap. 189, 12 S. W. 729, 19 Am. St. 817; P. v. Sullivan, 144 Cal. 471, 77 P. 1000; S. v. Balch, 136 Mo. 103, 37 S. W. 808; P. v. Mackinder, 80 Hun. 40, 29 N. Y. S. 842.

14. Ante, §§ 63, 63a, 71 et seq., particularly §§ 84, 85, 89; S. v. Glovery, 10 Nev. 24; Taylor v. C., 3 Bush, 508; S. v. Barnett, 3 Kan. 250, 87 Am. D. 471; Hollohan v. S., 32

sufficient in allegation to say that the defendant and another attempted to commit robbery by attempting to take by force from one named a sum of money belonging to a certain third person, by violence to his person putting him in fear of some immediate injury to his person; and then specifying particular acts done.[15]

§ 1008 a. **In Highway Robbery,**—it suffices to charge that on, etc., at, etc., "in the common highway of the State," not further specifying the particular highway, the defendant committed the felonious act.[16]

Mo. 399; C. v. Tanner, 5 Bush, 316, 318; S. v. Craft, 72 Mo. 456; S. v. Breckenridge, 33 La. Ann. 310; S. v. Hamilton, 13 Nev. 386.

15. S. v. Montgomery, 109 Mo. 645, 32 Am. St. 684, 19 S. W. 221. And see S. v. Smith, 119 Mo. 439.

16. S. v. Wilson, 67 N. C. 456. And see 1 Hale, P. C. 535; 2 East, P. C. 784, 3 Chit. Crim, Law, 806; S. v. Cowan, 7 Ire. 239; S. v. Anthony, 7 Ire. 234.

For Rout, see Riot, particularly § 992; Sabbath-Breaking, see Lord's Day; Scold, see Common Scold; Scriptures, Reviling, see Blasphemy and Profaneness; Sedition, see Dir. & F., §§ 938-942; Seduction and Abduction, see Stat. Crimes; Self-Murder, see Suicide, and Dir. & F., §§ 952-954; Selling Adulterated Milk, see Stat. Crimes; Selling Liquor, see Stat. Crimes.

CHAPTER CLI.

SEPULTURE.

Consult—for the law of violating sepulture, New Crim. Law, II, §§ 1188-1190. For the indictment, etc., Dir. & F., §§ 955-958. And see the indexes to this series of books.

§ 1009. 1. **There are various Offenses**—against the rights of sepulture;[17] as,—

2. **Executed Felon.**—If one employed to bury the body of an executed felon sells it for dissection, an indictment will be good at common law which alleges this.[18] Again,—

3. **Any other Person,**—under a legal duty to bury a corpse, and having the ability refusing, is punishable at common law on an indictment charging these facts.[19]

§ 1010. 1. **Robbing the Grave**—of an interred body (not larceny[20]) is the most frequent of these offenses. The indictment simply sets out the facts, with the name of the deceased person. If on a statute, the statutory terms also should be followed.[21]

2. **Name.**—If the deceased was an unnamed child, the parents' name may be averred, adding that it "had yet no name given to it."[22]

§ 1011. **Defacing Burying Grounds or Tombstones**—is indictable at common law and generally under statutes. The

17. New Crim. Law, I, §§ 468 (6), 506; II, §§ 1188, 1189.

18. Dir. & F., § 956. For a form and something of the evidence, see Rex v. Cundick, D. & R., N. P. 13.

19. See, for a form, &c., Reg. v. Vann, 2 Den. C. C. 325, 331, 5 Cox, C. C. 379.

20. New Crim. Law, II, § 780; ante, 725 (2), 751 (5).

21. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 665 (19th Ed. 996; 2 Chit. Crim. Law, 35; Dir. & F. § 957; Reg. v. Jacobson, 14 Cox, C. C. 522; P. v. Dalton, 58 Cal. 226; Reg. v. Sharpe, Dears. & B. 160, 7 Cox, C. C. 214; S. v. McClure, 4 Blackf. 328; S. v. Little, 1 Vt. 331: P. v. Graves, 5 Par. Cr. 134; McNamee v. P., 31 Mich. 473; C. v. Cooley, 10 Pick. 37.

22. Tate v. S., 6 Blackf. 110.

indictment charges the facts, varying with the cases and statutory terms.[23]

§ 1012. **Other Statutory Offenses,**—such as the receiving and concealing of a dead body,[24] the removing of it,[25] etc., require no special explanation of the procedure.

23. C. v. Wellington, 7 Allen, 299; C. v. Viall, 2 Allen, 512; Phillips v. S., 29 Tex. 226; S. v. Wilson, 94 N. C. 1015.

24. C. v. Loring, 8 Pick. 370.

25. C. v. Slack, 19 Pick. 304.

CHAPTER CLII.

SODOMY.

Consult—for the law of this offense, New Crim. Law, II, §§ 1191-1196. For the indictment and connected questions, Dir. & F., §§ 962-965. And see the indexes to this series of books.

§ 1013. **How the Indictment**—should be will appear on a consideration of the offense, stated in New Criminal Law. As committed with a man, it is an approved form to aver that on, etc., at, etc., the defendant "in and upon one X, then and there being, feloniously did make an assault, and then and there feloniously, wickedly, and against the order of nature, had a venereal affair with the said X, and then and there feloniously carnally knew him the said X, and then and there feloniously, wickedly, and against the order of nature with the said X did commit and perpetrate that detestable and abominable crime of buggery, not to be named among Christians."[26] Some of this is plainly surplusage.

§ 1014. **"Against the Form of the Statutes"**—concludes the indictment in the English precedents. The statutes are, consecutively, 25 Hen. 8, c. 6 (afterward made perpetual), 9 Geo. 4, c. 31, § 15, and 24 & 25 Vict. c. 100, § 61. They do little except regulate the grade of the offense and the punishment. If we assume that 25 Hen. 8 is common law with us,[27] still, in principle, the indictment with us, when not drawn on a statute of our own, need not have this conclusion.

26. Archb. Crim. Pl. & Ev. (10th ond. Ed.) 485, 486 (19th Ed.) 776; Dir & F. § 963. For other forms, see 2 Chit. Crim. Law, 48, 49; Reg. v. Allen, 1 Den. C. C. 364, 3 Cox, C. C. 270; Lambertson v. P., 5 Par. Cr. 200; Rex v. Wiseman, Fort, 91; Rex v. Audley, 3 How. St. Tr. 401, 407; C. v. Dill, 160 Mass. 536; Cross v. S., 17 Tex. Ap. 476. Definition. Com. v. Poindexter, 123 Ky. 720, 118 S. W. 943.

27. New Crim. Law, I, § 503 (1).

§ 1015. 1. **Carnal Knowledge.**—"In every indictment for this offense, there must be the words *rem habuit veneream et carnaliter cognovit.*"[28]

2. **Name of Animal.**—As, where the offense is with a man, his name must be given;[29] so, where it is with an animal, the sort of animal must, at least, be so far set out that the act will appear to be of the indictable kind.[30] It has been ruled in England sufficient to say "a certain animal called a bitch;"[31] in Texas it may be "mare, same being a beast."[32]

§ 1016. "**Buggery,**"—being the statutory word in 25 Hen. 8, c. 6, was, therefore, indispensable in an indictment on it.[33] If we accept this statute as common law with us, the same consequence will follow as to our indictments thereunder.

§ 1017. **Insufficient.**—In England it was adjudged too indefinite to charge against two, that they, in a certain open and public place called, etc., frequented by divers, etc., unlawfully met together for the purpose and with the intent of committing with each other, openly, lewdly, and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and sodomitical practice, and then and there unlawfully wickedly, openly, lewdly, and indecently did commit with each other, in the sight of divers of the liege subjects, etc., in the said public place there passing, etc., divers such practices as aforesaid.[34]

§ 1018. **Evidence.**—Where this offense is committed on a non-consenting person, who becomes a witness, it appears that his early complaints may be shown in corroboration, the same as those of the injured woman in rape.[35] If such person had consented, he would be an accomplice, whose

28. 1 Hawk, P. C. (Curw. Ed.) p. 357, § 2.

29. Ante, § 1013.

30. New Crim. Law, II, § 1192.

31. Reg. v. Allen, 1 Car. & K. 495.

32. Cross v. S., 17 Tex. Ap. 476.

33. Foster, 424; 2 Stark. Crim. Pl. (2d Ed.) 436.

34. Reg. v. Rowed, 3 Q. B. 180, 2 Gale & D. 518.

35. S. v. Gruso, 28 La. Ann. 952; P. v. Swist, 136 Cal. 520, 69 P. 223.

testimony would for this reason need corroboration.[36] The defendant's conduct and admissions are, of course, competent against him.[37] Penetration may be proved by circumstances, not necessarily requiring an eye-witness.[38] If we assume emission to be also necessary to the offense,[39] it may be inferred from the proofs of penetration, and other circumstances.[40]

§ 1018 a. **For the Attempt**—to commit sodomy, the procedure will follow the rules stated under the title Attempt.[41]

36. Medis v. S., 27 Tex. Ap. 194, 11 Am. St. 192; Territory v. Mahaffey, 3 Mont. 112.

37. C. v. Snow, 111 Mass. 411; S. v. McDowell, 61 Wash. 398, 112 P. 521.

38. Collins v. S., 73 Ga. 76; Territory v. Mahaffey, supra; Cross v. S., 17 Tex. Ap. 476.

39. New Crim. Law, II, §§ 1127 (2), 1131; White v. Com., 115 Ky. 473, 475, 73 S. W. 1120, 24 Ky. L. 2346.

40. P. v. Hodgkin, 94 Mich. 27.

41. And see, for forms of indictment, &c., Dir. & F., §§ 964, 965, 2 Chit. Crim. Law, 50; Reg. v. Allen, 1 Car. & K. 495. And see S. v. Place, 5 Wash. 773.

CHAPTER CLIII.

SUBORNATION OF PERJURY.

Consult—for the law of this offense, New Crim. Law, II, §§ 1197-1199. For the indictment, etc., Dir. & F., §§ 966-969. And for incidentals, see the indexes to this series of books.

§ 1019. **Only in Name**—is this a separate offense; being in fact a particular sort of perjury, or, in some way, accessorial to perjury.[42] It is so even when punishable by statute.[43]

§ 1020. **The Indictment**—follows principles stated in the title Perjury.[44] It must allege all the several elements of a *prima facie* case.[45]

§ 1021. **Actually Committed**—must be the solicited perjury.[46] Hence the indictment must aver that it was.[47] So—

§ 1022. **The Evidence**[48]—must sustain this averment.[49] The record of the socilited person's conviction is not alone adequate against the suborner.[50] Nor, again, can there be

42. Ante, §§ 938, 939.

43. C. v. Smith, 11 Allen, 243, 256, 257.

44. For forms for subornation, see Archb. Crim. Pl. & Ev. (10th Lond Ed.) 575-577 (19th Ed.) 885-887; Dir. & F., § 968; Watson v. S., 5 Tex. Ap. 11, 21; C. v. Simth, 11 Allen, 243. The precedents in Tremaine seem not to be within the modern definitions; as see Rex v. Tasborough, Trem. P. C. 169; Rex v. Hickley, Trem. P. C. 171; Rex v. Hilton, Trem. P. C. 174; McClelland v. P., 49 Colo. 538, 113 P. 640; U. S. v. Brace (D. C.), 149 F. 869.

45. Ib.; S. v. Simons, 30 Vt. 620; U. S. v. Wilcox, 4 Blatch. 393; Stewart v. S., 22 Ohio St. 477; P. v. Ross, 103 Cal. 425, 37 P. 379; Thompson v. S., 89 Wis. 253, 61 N. W. 565; C. v. Lane, 157 Mass. 462, 32 N. E. 655; S. v. Joaquin, 69 Me. 218; U. S. v. Thompson, 12 Saw. 438, 31 Fed. Rep. 331; U. S. v. Dennee, 3 Woods, 39; Stratton v. P., 81 N. Y. 629; C. v. Stone, 152 Mass. 498, 25 N. E. 967; P. v. Thomas, 63 Cal. 482.

46. New Crim. Law, II, § 1056; ante, § 938.

47. U. S. v. Wilcox, 4 Blatch. 393.

48. Watson v. S., 5 Tex. Ap. 11.

49. 1 Hawk, P. C. (6th Ed. c. 69, § 10; Archb. Crim. Pl. & Ev. (19th Ed.) 887.

50. Rex v. Reilly, 1 Leach, 454.

a conviction on such person's testimony to this part of the case, unless it is corroborated.[51]

§ 1023. New Trial.—If the person charged with the subornation is tried and convicted, and then the one charged with the perjury is acquitted, the former will be entitled to a new trial.[52]

51. P. v. Evans, 40 N. Y. 1. But see U. S. v. Thompson, 12 Saw. 438, 31 Fed. Rep. 331; S. v. Renswick, 85 Minn. 19, 88 N. W. 22.

52. Maybush v. C., 29 Grat. 857. A suborner is not an accessory to the perjury. S. v. Justesen, 35 Utah, 105, 99 P. 456.

For Sunday, see Lord's Day; Swearing, see Blasphemy and Profaneness; Tax and Other Revenue Laws, see Ir. & F., §§ 970,975.

CHAPTER CLIV.

THREATENING LETTERS AND OTHER THREATS.

Consult—for the law of this offense, New Crim. Law, I, §§ 562, 563, 767 (2); II, §§ 407, 1200-1201a. For the indictment and connected questions, Dir. & F., §§ 976-980. And see the indexes to this series of books.

§ 1024. **A Common law Indictment**—for this offense will seldom or never be required in practice, so none will be here given. For though the wrong we are considering is to some extent punishable by the common law,[53] the statutory indictment is so much more convenient and effectual that the other is practically unused and unknown.

§ 1025. **The Statutory Indictment**—will vary with the terms of the particular enactment on which it is drawn. Under 7 & 8 Geo. 4. c. 29, § 8 (re-enacted, with slight variations, in 24 & 25 Vict. c. 96, § 44), to punish one who "shall knowingly send or deliver any letter or writing demanding of any person, with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security," it was an approved form to say that on, etc., at, etc., the defendant "knowingly and feloniously did send to one X a certain letter, directed to the said X, by the name and description of Mr. X, demanding money from the said X, with menaces, and without any reasonable or probable cause; and which said letter is as follows, that is to say," etc.; setting it out verbatim.[54]

53. New Crim. Law, II, § 1201 (1). The indictment must allege the name of the party threatened. S. v. Waite, 101 Iowa, 377, 70 N. W. 596.

54. Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 606. For other forms under various statutes, see Dir. & F., §§ 977, 979; Reg. v. Braynell, 4 Cox, C. C. 402; Rex v. Wagstaff, Russ. & Ry. 398; Reg. v. Robertson, Leigh & C. 483; Robinson v. C., 101 Mass. 27; C. v. Moulton, 108 Mass. 307; Rex v. Abgood, 2 Car. & P. 436; Reg. v. Carruthers, 1 Cox, C. C. 138; Reg. v. Flannery, Jebb, 243; C. v. Murphy, 12 Allen, 449; S. v. Young, 26 Iowa, 122; C. v. Carpenter, 108 Mass. 15; Buie v. S., 1 Tex. Ap. 58; Biggs v. P., 8 Barb. 547;

§ 1026. Tenor or Substance.—It is perceived that within a distinction already explained,[55] the letter in this precedent is set out by its tenor, not its mere substance; and such method appears to have been adjudged essential.[56] Assuming this view to be just in principle, it does not follow that the same form of setting out the written or oral words would be required under every statute against the employment of threats for a wrongful purpose. Therefore under some of the statutes the substance of the threat, or the simple fact that the prohibited threat was made, has been held adequate in allegation.[57]

§ 1027. 1. Following the Statutory Terms,[58]—the indictment must directly allege each of the several facts which together constitute the offense.[59] Under a statute requiring the threat to be made "either verbally or by any written or printed communication," it was held that these words could not be altogether omitted from the allegations; because there might be a threat which was not within them.[60]

2. **"Punishable by Law."**—In an indictment for accus-

Reg. v. Jones, 2 Cox, C. C. 434, 1 Den, C. C. 218; Kistler v. S., 54 Ind. 400; Hewitt v. Newburger, 141 N. Y. 538, 36 N. E. 593. And see Kessler v. S., 50 Ind. 229; Longley v. S., 43 Tex. 490; S. v. McCabe, 135 Mo. 450, 37 S. W. 123, 34 L. R. A. 127 (injury to reputation). P. v. Wickes, 112 Ap. Div. 29, 98 N. Y. S. 163 (threat to accuse of crime). P. v. Brennan, 121 Cal. 495, 53 P. 1098; Chunn v. S., 125 Ga. 789, 54 S. E. 751; Glover v. P., 204 Ill. 170, 68 N. E. 464; S. v. Waite, 101 Iowa, 377, 70 N. W. 596.

55. Vol. II, §§ 559-563; ante, §§ 178, 250, 403, 732, 789, 790, 808, 809, 915, 916.

56. Rex v. Lloyd, 2 East, P. C. 1122, 1124; Tynes v. S., 17 Tex. Ap. 123.

57. C. v. Moulton, 108 Mass. 307, 308; C. v. Dorus, 108 Mass. 488; C. v. Goodwin, 122 Mass. 19; S. v. Young, 26 Iowa, 122; C. v. Murphy, 12 Allen, 449; S. v. O'Mally, 48 Iowa, 501; S. v. Stewart, 90 Mo. 507; C. v. Philpot, 130 Mass. 59.

58. Rex v. Abgood, 2 Car. & P. 436.

59. Rex v. Dunkley, 1 Moody, 90; S. v. Morgan, 3 Heisk. 262; S. v. Ullman, 5 Minn. 13; C. v. Dyer, 128 Mass. 70; U. S. v. Fero, 18 Fed. Rep. 901. And see Gay v. S., 3 Tex. Ap. 168; S. v. Waite, 101 Iowa, 377, 74 N. W. 596; Glover v. P., 204 Ill. 170, 68 N. E. 464.

60. Robinson v. C., 101 Mass. 27, 28.

ing one of a crime "punishable by law,"[60a] it is not sufficient simply to cover these words in allegation, but the defendant's act must be so particularized as to disclose its criminal quality.[61]

§ 1028. 1. **Allegation and Proof of Intent**—must harmonize; as, if that averred was to extort money, and that proved was to procure the delivering up of a bill of exchange, the proceeding will fail.[62] The intent charged may be inferred by the jury from the circumstances, as in other cases.[63] Evidence that the black-mailing letter was sent, not in earnest but as a joke, and that shortly before the receiver had played severe jokes on the defendant, is admissible on the question of intent.[64] So,—

2. **Variance**—should in every respect be avoided.[65]

§ 1029. **Other Instances**—of like threats from the defendant to the same person, or confessions of them, may, to prove the intent and meaning, be shown.[66]

§ 1029 a. **The Meaning**—of the threatening language, and whether it contains the threat alleged, is in a case of

60a. It is usually sufficient to describe the crime accused in the language of the statute making it a crime. Glover v. P., 204 Ill. 170, 68 N. E. 464; Strohm v. P., 160 Ill. 582; 43 N. E. 622; Houselman v. P., 168 Ill. 172, 48 N. E. 304.

61. Mann v. S., 47 Ohio St. 556. And see Elliott v. S., 36 Ohio St. 318; Brabham v. S., 18 Ohio St. 485. The guilt of one threatened with an accusation of crime is not usually material though evidence on that question is sometimes admissible on the motive of accused. Com. v. Jones, 121 Mass. 57; S. v. Goodwin, 37 La. Ann. 713; Mann v. S., 47 Ohio St. 556, 26 N. E. 226; S. v. Waite, 101 Iowa, 377, 70 N. W. 596.

62. Rex v. Major, 2 East, P. C. 1124.

63. Reg. v. Coghlan, 4 Fost. & F. 316. And see March v. S., 3 Tex. Ap. 107; Aycock v. S., 2 Tex. Ap. 381; P. v. Loveless, 84 N. Y. S. 1114; P. v. Hoffman, 126 Cal. 366, 56 P. 856; S. v. Waite, 101 Iowa, 377, 70 N. W. 596.

64. Norris v. S., 95 Ind. 73, 48 Am. R. 700.

65. C. v. Bacon, 135 Mass. 521; P. v. Jones, 62 Mich. 304, 28 N. W. 839; C. v. Buckley, 148 Mass. 27, 18 N. E. 577.

66. Rex v. Robinson, 2 East, P. C. 1110, 1124; Shifflet v. C., 14 Grat. 652; Reg. v. Cooper, 3 Cox, C. C. 547; Aycock v. S., 2 Tex. Ap. 381; Thrasher v. S., 3 Tex. Ap. 281. See Reg. v. McDonnell, 5 Cox, C. C. 153; Reg. v. Kain, 8 Car. & P. 187; Glover v. P., 204 Ill. 170, 68 N. E. 464.

doubt a question for the jury.[67] Ambiguous words may be explained by parol.[68] And the jury are to find their true meaning.[69]

§ 1029 b. **Other Evidence.**—The evidence may assume various other forms, but, they need no special explanation.[70]

67. S. v. Stewart, 90 Mo. 507, 2 S. W. 790; Dunn v. S., 48 Tex. Cr. 25, 63 S. W. 571.

68. S. v. Linthicum, 68 Mo. 66.

69. Reg. v. Hendy, 4 Cox, C. C. 243; Reg. v. Carruthers, 1 Cox, C C. 138; Longley v. S., 43 Tex. 490. As to what constitutes an abusive letter tending to provoke a breach of the peace, see, Peters v. S., 166 Ala. 35, 51 So. 952.

70. C. v. Jones, 121 Mass. 57; Reg. v. Miard, 1 Cox, C. C. 22; Haynie v. S., 2 Tex. Ap. 168; Reg. v. Kain, 8 Car. & P. 187; Mitchell v. C., 75 Va. 856.

For Tippling-Houses, see Stat. Crimes, and Dir. & F., §§ 817-822; Tolls, Offenses as to, see Stat. Crimes, and Dir. F., §§ 981-985; Trades, Offensive, see New Crim. Law, I, §§ 1138-1144; ante, §§ 875-877; Dir. & F., §§ 827-831.

CHAPTER CLV.

TREASON.

Consult—for the law of this offense, New Crim. Law, II, §§ 1202-1255. For the indictment and connected questions, Dir. & F., §§ 986-989. And see, for multitudes of incidental questions, the indexes to this series of books.

§ 1030. **How Chapter divided.**—We shall consider, I. The Indictment; II. The Evidence; III. Questions of Practice.

I. *The Indictment.*

§ 1031. **The Indictment**—sets out, in language technical to this offense, yet varying in detail with the special facts, the several elements which in law constitute the particular treason.[71]

§ 1032. **Overt Act.**—One of the most important allegations is of the overt act,—indispensable always.[72] It is common to charge it, in a case of levying war, as an assembling of the traitors arrayed in a warlike manner.[73] Each particular thing done by each one, or a detail of the evidence, is not required.[74]

71. For forms applicable in the United States, for the several treasons, see Dir. & F., §§ 986-989; for levying war, see Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 492, 493, (19th Ed.) 785; 2 Chit. Crim. Law, 79, 83; Rex v. Hamilton, Foster, 5; Reg. v. Davitt, 11 Cox, C. C. 676; Reg. v. Gallagher, 15 Cox, C. C. 291; Respublica v. Carlisle, 1 Dall. 35. And see U. S. v. Greathouse, 2 Abb. U. S. 364.

72. Vaughan's Case, 2 Salk. 634. See New Crim. Law, II, §§ 1231-1234.

73. Archb. ut sup.

74. Foster, 220; Respublica v. Carlisle, 1 Dall. 35. See Rookwood's Case, Holt, 683, 686; Vaughan's Case, supra.

§ 1033. **Names of Co-conspirators.**—Where co-conspirators are necessary to the offense,—that is, others than those made defendants,—their names if known should, by analogy to other cases, it appears, be given.[75]

§ 1034. **"Contrary to Allegiance."**—The wrongful act must, to constitute the offense, be contrary to the defendant's duty of allegiance.[76] Hence there must be an averment that it was so. Commonly this allegation is made a part of the conclusion, but probably its location in the indictment is not material.[77]

§ 1035. **"Traitorously"**—we have seen to be essential.[78]

II. *The Evidence.*

§ 1036. **The Evidence**—in this offense follows in general the ordinary rules, requiring no special explanation here.[79] As to—

§ 1037. **"Two Witnesses."**—In treason against the United States, the Constitution forbids a conviction "unless on the testimony of two witnesses to the same overt act, or on confession in open court;"[80] and in most or all of our States, trials for treason against the State are similarly regulated. The English, 1 Edw. 6, c. 12, § 22,[81] had simply, where there was no plea of guilty, directed that the defendant should be "accused by two sufficient and lawful witnesses;" under which provision the two were adequate though testifying to different overt acts of the same species of treason. And so in terms was 7 Will. 3, c.

75. Ante, § 998 (3). But see ante, § 225.

76. New Crim. Law, II, § 1235.

77. Rex v. Cranburne, 13 How. St. Tr. 221, 226-228; Rex v. Tucker, Comb. 257. And see Hanauer v. Doane, 12 Wall. 347.

78. Vol. II, § 534.

79. Reg. v. Davitt, 11 Cox, C. C. 676; U. S. v. Mitchell, 2 Dall. 348; U. S. v. Hanway, 2 Wall. Jr. 139; Respublica v. Malin, 1 Dall. 33; Horne Tooke's Case, 1 East, P. C. 60, 69, 25 How. St. Tr. 1; Respublica v. Carlisle, 1 Dall. 35; Reg. v. Frost, 9 Car. & P. 129.

80. New Crim. Law, II, § 1214.

81. In connection with this, are to be considered 5 & 6 Edw. 6, c. 11, § 12, 1 & 2 Phil. & M., c. 10, § 11, and 7 Will. 3, c. 3, § 2. Rex v. Gahagan, 1 Leach, 42.

3.[82] It is perceived that the rule with us is different. Again,—

§ 1038. 1. **Other Localities.**—Within limits which every intelligent practitioner will understand, there may be evidence of things done in other localities than the one wherein the offense is laid.[83] So,—

2. **Co-conspirators.**—When a conspiring between the defendants, or between them and others, has been proved,[84] what one did may be shown against the rest.[85]

§ 1039. **A Co-defendant**—in an indictment not on trial, if not joined also in the one being tried, may testify for the defendant in the latter.[86]

III. *Question of Practice.*

§ 1040. **Verdict.**—A special finding that the defendant was present among traitors, hallooing, eac., yet silent as to whether or not he was consenting, will not sustain a conviction. The omitted fact is indispensable.[87]

§ 1041. **Order to Restore Money.**—The court will not order the restoration to the prisoner, before trial, of money taken from him,[88] if it constitutes a part of the proofs.[89]

82. High Treason Case, J. Kel. 7, 9; Stafford's Case, T. Raym. 407; Lowick's Case, Holt, 688; Rex v. Jellias, 1 East, P. C. 130; Thomas's Case, 1 Dy. 99b, pl. 68; Rex v. Gahagan, supra; Tong's Case, J. Kel. 17, 18.

83. J. Kel. 15, 33.

84. Vol. II, § 1248.

85. Reg. v. Brittain, 3 Cox, C. C. 76; Rex v. Stone, 6 T. R. 526, 1 East, P. C. 79, 99; Reg. v. Frost, 9 Car. & P. 129, 149.

86. U. S. v. Hanway, 2 Wal. Jr. 139.

87. Rex v. Huggins, 2 Ld. Raym. 1574, 1585.

88. Vol. I, §§ 210-212.

89. Reg. v. Frost, 9 Car. & P. 129.

For Trepass, Forcible, see Forcible Trespass; Trespass to Lands, see Dir. & F., § 990-995; Unlawful Assembly, see Riot, &c.; Unlicensed Business, see Stat. Crimes, and Dir. & F., § 996-1001; Unlicensed Liquor Selling, see Stat. Crimes; Unlicensed Lotteries, see Stat. Crimes; Unnatural Crime, see Sodomy; Usury, see New Crim. Law and Dir. & F.; Vagrancy, see Dir. & F., §§ 1004-1010; Verbal Slander, see Libel and Slander; Violation of Sabbath, see Lord's Day; Voting, Illegal, see Stat. Crimes; Wager, see Stat. Crimes.

CHAPTER CLVI.

WAY.

Consult—for the criminal law of public ways, New Crim. Law, II, §§ 1264-1287. For the various forms of indictment, and related questions, Dir. & F., §§ 1011-1029. And see, for incidental questions, the indexes to this series of books.

§ 1042. **How Chapter Divided.**—We shall consider, I. The Indictment and Pleadings for the Non-repair of a Public Way; II. The Indictment for obstructing a Public Way; III. The Evidence; IV. Questions of Practice.

I. *The Indictment and Pleadings for the Non-repair of a Public Way.*

§ 1043. **Indictment.**—Under the English system of public ways, complicated by prescriptive duties which must be averred and proved, more of allegation may be required than under our simpler statutory provisions. Under either system, a *prima facie* case must be shown. If the duty and the corporate body whereon it rests are pointed out by public law, on principle, they need not be averred; otherwise, they must be. Beyond this, the way, its insufficient condition, and the neglect of the defendant therein, must be set out with time and place, all expanded with due particularity. As to which, a bridge is the same as the other parts of the way.[90] More particularly,—

90. For forms and general doctrines, see Dir. & F., §§ 1011-1029; Archb. Crim. Pl. & Ev. (19th Ed.) 970; 3 Chit. Crim. Law, 577; Rex v. Devon, 4 B. & C. 770; Reg. v. Turweston, 16 Q. B. 109; S. v. Northumberland, 46 N. H. 156; Reg. v. New Sarum, 7 Q. B. 941; Reg. v.

§ 1044. **When the Duty to Repair**—is not fully declared in the laws which the court judicially knows, it must be distinctly averred, so as to disclose a legal liability.[91] And if such liability is different from the common course of custom or law,—as, if the defendant is a private person or a turnpike corporation, the general duty of repair being on the town or county,—the manner in which it arose must also be alleged.[92]

§ 1045. **In the Description of the Way,**[93]—the books are not in all respects distinct or uniform as to what is necessary. Pretty plainly the width need not be stated;[94] neither need the *termini* are often given.[95] If the latter are alleged, they must, to avoid a variance, be proved.[96] And other things of this general sort, obvious to the practitioner, will require attention.[97] So the origin of the way, or the manner of laying it out, is not essential; but the simple

Sainthill, 2 Ld. Raym. 1174; Reg. v. Waverton, 17 Q. B. 562; Reg. v. Midville, 4 Q. B. 240; Cumberland v. Rex, 3 B. & P. 354; Reg. v. Denton, Dears, 3, 18 Q. B. 761, 14 Eng. L. & Eq. 124; C. v. Newburyport Bridge, 9 Pick. 142; C. v. Newburyport, 103 Mass. 129; C. v. Springfield, 7 Mass. 9; S. v. Madison, 63 Me. 546; C. v. Central Bridge, 12 Cush. 242; S. v. McDowell, 84 N. C. 798; S. v. King, 3 Ire. 411; Hammar v. Covington, 3 Met. Ky. 494; Rex v. Stoughton, 2 Saund. (Wms. Ed.) 157, and see notes.

91. Rex v. Liverpool, 3 East, 86; Moore v. S., 26 Ala. 88; Rex v. Auckland, 1 A. & E. 744, 1 Moody & R. 286; Rex v. St. Pancras, Peake, 219. And see Rex v. Scarisbrick, 6 A. & E. 509, 1 Nev. & P. 582; S. v. Davenport, &c. Ry. 47 Iowa, 507; S. v. McDowell, 84 N. C. 798; Ward v. S., 12 Lea, 469.

92. Rex v. Penderryn, 2 T. R. 513, 515; S. v. New Jersey Turnpike, 1 Harrison, 222; Reg. v. Bucknell, Holt, 128; S. v. King, 3 Ire. 411; Reg. v. Haughton, 1 Ellis & B. 501, 18 Eng. L. & Eq. 287; Parkinson v. S., 2 W. Va. 589; Rex v. Machynlleth, 2 B. & C. 166; s. c. nom. Penegoes, 3 D. & R. 388. See Byron v. S., 35 Wis. 313.

93. And see post, § 1051.

94. S. v. Madison, 63 Me. 546. Contra, Rex v. All Saints, Cas. temp. Hardw. 105; Rex v. Hatfield, Cas. temp. Hardw. 315.

95. C. v. Newbury, 2 Pick. 51; S. v. Newfane, 12 Vt. 422; Rex v. Haddock, Andr. 137, 145.

96. S. v. Northumberland, 46 N. H. 156; Rex v. St. Weonard's, 6 Car. & P. 582; Rex v. Great Canfield, 6 Esp. 136.

97. Rex v. Gamlingay, 1 Leach, 528, 3 T. R. 513; Reg. v. Steventon, 1 Car. & K. 55; Rex v. Harrow, 4 Bur. 2090; S. v. Dover, 10 N. H. 394; Reg. v. Dotfield, Car. & M. 151.

averment is sufficient that it is a public highway duly established.[98] In England, where there are many sorts of public ways, it is common to say that the one in question is a footway, a way for horses, or the like; but it is, at least, doubtful whether so much particularity is necessary,[99] and in reason it would seem not to be with us. Yet this sort of description, if made, must be proved.[1] A bridge in a public way may be described in a like general manner.[2]

§ 1046. **Place.**—Where, to render the defendant liable, the way must be in a particular town or other locality less than the county, such place must, in addition to the general venue, be averred.[3]

§ 1047. **The Condition**—of the way, that it needs repair, and where and wherein, must be stated, and with reasonable particularity.[4] Yet, for example, the number of feet out of repair in a bridge need not be given.[5]

§ 1048. **Neglects by Official Persons,**—required by law to keep public ways in repair, are a species of non-feasance in office, the principles regulating the procedure for which have been already considered.[6] Some cases are cited in a note.[7]

98. S. v. Raymond, 7 Fost. N. H. 388; Aspindall v. Brown, 3 T. R. 265; Reg. v. Turweston, 16 Q. B. 109.

99. Rex v. Hatfield, Cas. temp. Hardw. 315. See Allen v. Ormond, 8 East, 4; Reg. v. Lordsmere, 15 Q. B. 689; Reg. v. Turweston, 16 Q. B. 109. But see Reg. v. Sainthill, 2 Ld. Raym. 1174, 1175.

1. Rex v. Lyon, Ryan & Moody, N. P. 151; s. c. nom. Rex v. Lynn, 1 Car. & P. 527; Rex v. St. Weonard's, 5 Car. & P. 579; S. v. Strong, 25 Me. 297; Reg. v. Sturge, 3 Ellis & B. 734.

2. Reg. v. Saintiff, 6 Mod. 255; S. v. Milo, 32 Me. 57; Reg. v. Adderbury East, 5 Q. B. 187. But see Malone v. S., 51 Ala. 55.

3. Rex v. Upton-on-Severn, 6 Car. & P. 133; C. v. North Brookfield, 8 Pick. 463; Rex v. Spiller, Styles, 108, 3 Salk. 77.

4. Reg. v. Stretford, 2 Ld. Raym. 1169; S. v. Canterbury, 8 Fost. N. H. 195; Rex v. Upton-on-Severn, 6 Car. & P. 133; S. v. Milo, 32 Me. 55; Reg. v. Waverton, 2 Den. C. C. 340, 5 Cox, C. C. 400, 8 Eng. L. & Eq. 344.

5. Reg. v. Sainthill, 2 Ld. Raym. 1174, 1175, 1 Salk. 359.

6. Ante, § 819 et seq.

7. Nowlin v. S., 49 Ala. 41; Massure v. S., 36 Tex. 377; S. v. Mathis, 30 Tex. 506; S. v. Forrest, 30 Tex. 503; Sennett v. S., 17 Tex. 308; S. v. McMurrin, 1 Ind. 44; Dormar v.

§ 1049. **The Pleadings.**—In England, there are defenses to the indictment for non-repair not permissible under not guilty, but requiring a special plea.[8] This is so, for example, in some cases wherein a parish, obligated "of common right" to repair, would defend itself by casting the duty on another.[9] But defenses of the kinds liable to arise in this country are, it is believed, by the English practice, allowable under not guilty.[10] Certainly, in principle, they are; and our American books disclose little if any peculiar practice of this sort in our courts.

II. *The Indictment for Obstructing a Public Way.*

§ 1050. **The Indictment**—avers, with due particularity, that on, etc., at, etc., in a common highway there, the defendant did things which it specifies to the obstruction of the way. If on a statute, it covers also the statutory terms. And in other respects it is drawn after the rules[11] for nuisance.[12]

S., 31 Ark. 49; S. v. Hageman, 1 Green, N. J. 314.

8. A reference to some of the cases may be convenient; but not in all of them, where the special plea was resorted to, was it even supposed to be necessary, nor do all represent the true modern doctrine. Rex v. Terrel, Comb. 312; Reg. v. Ely, 4 Cox, C. C. 281; Rex v. Bridekirk, 11 East, 304; Reg. v. Ashby Folville, 10 Cox, C. C. 269; Rex v. Hammersmith, 1 Stark. 357.

9. Anonymous, 1 Vent. 256, 3 Salk. 392; Rex v. St. Andrews, 1 Mod. 112; Rex v. Hornesey, 12 Mod. 13; Rex v. Eastrington, 5 A. & E. 765, 1 Nev. & P. 193; Rex v. Nottingham, 2 Lev. 112; Reg. v. Barnoldswick, 4 Q. B. 499.

10. 1 Russ. Crimes (5th Eng. Ed.) 497 et seq.; Rex v. Norwich, 1 Stra. 177, 181; Rex v. Taunton, St. Mary, 3 M. & S. 465; Rex v. Brown, 11 Mod. 273.

11. Ante, §§ 861-867.

12. For forms, and the general doctrine regulating them, see Dir. & F., §§ 1012-1016, 1021, 1024, 1026, 1027; Archb. Crim. Pl. & Ev. (10th Lond. Ed.) 640 (19th Ed.) 966; Thompson v. S., 20 Ala. 54; S. v. Lemay, 13 Ark. 405; S. v. Grand Trunk Ry. 59 Me. 189; S. v. Wentworth, 37 N. H. 196; Wood v. S., 5 Ind. 433; S. v. Close, 35 Ia. 570; Rex v. Baxter, Trem, P. C. 196; Rex v. Russell, 6 B. & C. 566; Rex v. Russell, 6 East, 427; C. v. Gowen, 7 Mass. 378; C. v. Wentworth, Brightly, 318; C. v. Goodnow, 117 Mass. 114; C. v. Belding, 13 Met. 10; Rex v. Wright, 1 A. & E. 434; C. v. Bakeman, 105 Mass. 53; C. v. Killian, 109 Mass. 345, 12 Am. R. 714; Reg. v. Burrell, 10 Cox, C. C. 462; Reg. v. Train, 2

§ 1051. The Description of the Way—is in substance the same as stated in the last sub-title.[13] The *termini* need not be given;[14] but if given, they must be proved.[15] The laying out need not be averred; to say that it was a public way suffices.[16] Whether the name of the street, if it has one, or other like designation, to individualize the transaction, is necessary to be alleged, like the name of a man or the species of an animal injured, would seem to be a question on which usage differs. It is required by some of the authorities.[17] And there is good sense in this view.[18]

§ 1052. The Obstruction—should be set out with reasonable distinctness, showing a substantial interfence with pub-

B. & S. 640; Reg. v. Holroyd, 2 Moody & R. 339; C. v. Gloucester, 110 Mass. 491; Rex v. Harvey, Trem, P. C. 197; Rex v. H. P. Trem, P. C. 196; Reg. v. Bradord, Bell, C. C. 268, 8 Cox, C. C. 309; Reg. v. Hadfield, Law Rep. 1 C. C. 253, 11 Cox, C. C. 574; Reg. v. Betts, 16 Q. B. 1022; C. v. Alger, 7 Cush. 53; C. v. Knowlton, 2 Mass. 530; S. v. Bell, 5 Port. 365; S. v. Beckman, 57 N. H. 174; Reg. v. Mutters, Leigh & C. 491, 10 Cox, C. C. 6; Gregory v. C., 2 Dana, 417; C. v. Walters, 6 Dana, 290; C. v. Hicks, 7 Allen, 573; S. v. Mead, 27 Vt. 722; S. v. Tomlinson, 77 N. C. 528; S. v. Clemens, 38 Iowa, 257; S. v. Bacon, 40 Vt. 456; S. v. Vermont Central Rld. 27 Vt. 103; S. v. Baltimore, etc., Rld., 120 Ind. 298, 22 N. E. 307; Laroe v. S., 30 Tex. Ap. 374; S. v. Narrows I. Club, 100 N. C. 477, 6 Am. St. 618, 5 S. E. 411; Bailey v. C., 78 a. 19; S. v. Holman, 29 Ark. 58; C. v. Chase, 127 Mass. 7; S. v. Chesapeake, etc. Ry. 24 W. Va. 809; Wabash, etc. Ry. v. P., 12 Bradw. 448; Riley v. S., 95 Ind. 446; S. v. Turner, 21 Mo. Ap. 324; S. v. Edens, 85 N. C. 522; S. v. Beckman, 57 N. H. 174; S. v. Fleetwood, 16 Mo. 448; C. v. Rowe, 141 Mass. 79; C. v. Lagorio, 141 Mass. 81, 6 N. E. 546; Cornell v. S., 7 Bax. 520; S. v. Boyd, 86 N. C. 634.

13. Ante, § 1045.

14. Rex v. Haddock, Andr. 137, 145; Rex v. Hamond, 1 Stra. 44; Matthews v. S., 25 Ohio St. 536; S. v. Hume, 12 Ore. 133.

15. Reg. v. Botfield, Car. & M. 151; Reg. v. Fisher, 8 Car. & P. 612.

16. Anderson v. S., 10 Humph. 119; S. v. Collins, 38 Tex. 189; S. v. Gilbert, 73 Mo. 20.

17. S. v. Hogan, 31 Mo. 340; Cox v. S., 3 Blackf. 193; S. v. Stewart, 66 Ind. 555; S. v. Withrow, 47 Ark. 551, 2 S. W. 184; S. v. Crumpler, 88 N. C. 647.

18. See further, on the general subject of this section, Rex v. Downshire, 4 A. & E. 232, 5 Nev. & M. 662; Reg. v. Sutrge, 3 Ellis & B. 734, 26 Eng. L. & Eq. 171; S. v. Graham, 15 Rich. 310; S. v. Junker, 37 Tex. 478; Nichols v. S., 89 Ind. 298; S. v. Eastman, 109 N. C. 785, 13 S. E. 1019; Palatka, etc. Rld. v. S., 23 Fla. 546, 11 Am. St. 395, 3 So. 158; S. v. Smith, 100 N. C. 550, 6 S. E. 251.

lic rights.[19] If it is an encroachment by a building, what particular part was placed in the way need not be stated.[20] But it is too loose to say that the defendant erected thereon " a number of wooden sheds and buildings, one hundred feet in length and sixteen feet in breath."[21] The length and width of the obstruction, or the part of the way obstructed, need not be averred.[22] If there is to be an order of abatement, the location must be set out within rules already specified.[23] But otherwise the exact part of the road need not be mentioned.[24]

§ 1053. Proceedings other than by Indictment—are in some the States provided for obstructions to public ways.[25]

III. *The Evidence.*

§ 1054. Proof of Way.—That a way is commonly used by the public is, in general, *prima facie* evidence of its being a public way lawfully established;[26] but to this doc-

19. S. v. Baker, 58 Ind. 417; Giardina v. Greenville, 70 Miss. 896, 13 So. 241.

20. S. v. Atherton, 16 N. H. 203.

21. C. v. Hall, 15 Mass. 240. "A certain impediment, to wit, a large quantity of logs, sticks, brushwood, and dirt, did erect and cause to be erected," etc., is good. Thompson v. S., 20 Ala. 54.

22. S. v. Day, 52 Ind. 483; Rex v. East Lidford, Say. 301; Respublica v. Arnold, 3 Yeates, 417.

23. Ante, § 866 (3); Wood v. S., 5 Ind. 433. And see Rex v. Knight, 7 B. & C. 413, 1 Man. & R. 217.

24. Matthews v. S., 25 Ohio St. 536. See further, as to the subject of this section, Justice v. C., 2 Va. Cas. 171; S. v. Clemens, 38 Iowa, 257; S. v. Portland, etc. Rld., 58 Me. 46; S. v. Collins, 38 Tex. 189; S. v. Graham, 15 Rich. 310; Cox v. S., 3 Blackf. 193; S. v. Lord, 16 N. H. 357.

25. Pettinger v. P., 20 Mich. 336; Crosby v. Gipps, 19 Ill. 309; San Benito v. Whitesides, 51 Cal. 416; S. v. Hayden, 32 Wis. 663; Higgins v. Grove, 40 Ohio St. 521; Miller v. S., 72 Ind. 421; S. v. Sweeney, 33 Minn. 23; S. v. Cotton, 29 Minn 187.

26. C. v. Hicks, 7 Allen, 573; Golahar v. Gates, 20 Mo. 236; Kimbrough v. S., 10 Humph. 97; McWhorter v. S., 43 Tex. 666; Reg. v. East Mark, 11 Q. B. 877; Reg. v. Chorley, 12 Q. B. 515; Holleman v. C., 2 Va. Cas. 135; C. v. Belding, 13 Met. 10; Johns v. S., 104 Ind. 557, 4 N. E. 153; S. v. Davis, 27 Mo. Ap. 624; S. v. Schwin, 65 Wis. 207, 26 N. W. 568; P. v. Loehfelm, 102 N. Y. 1, 5 N. E. 783; Michel v. S., 12 Tex. Ap. 108; Berry v. S., 12 Tex. Ap. 249; Hall v. S., 13 Tex. Ap. 269. And see Shelby v. S., 10 Humph. 165. But this sort of evidence does not sustain an averment that it is a

trine there are familiar qualifications.[27] So, prior judicial proceedings, conclusively or presumptively establishing the way, or proving its existence, may be shown.[28] If it has never been used, its existence cannot be proved by parol.[29]

§ 1055. **Other Questions**—of evidence may arise, but they involve no principles requiring special elucidation.[30]

IV. *Questions of Practice.*

§ 1056. **The Staying of Judgment**—for the defendant to abate the nuisance, and the imposing of a lighter sentence on his doing it voluntarily, have already been explained.[31]

§ 1057. **Other Questions**—of practice have arisen, but either they have found a place in other connections, or they are not of general interest.

"public road, lawfully established and classified as a first-class road." Meuly v. S., 3 Tex. Ap. 382.

27. Golahar v Gates, supra; S. v. Strong, 25 Me. 297; Anderson v. S., 10 Humph. 119; S. v. Sturdivant, 18 Me. 66; S. v. O'Laughlin, 19 Kan. 504. See C. v. Belding, 13 Met. 10.

28. Reg. v. Hallam, 24 Law T. 109, 29 Eng. L. & Eq. 200; Blodget v. Royalton, 14 Vt. 288; Reg. v. Haughton, 1 Ellis & V. 501, 18 Eng. L. & Eq. 287; Rex v. Whitney, 7 Car. & P. 208; Reg. v. Hickling, 7 Q. B. 880; O'Dea v. S., 16 Neb. 241; S. v. Ramsey, 76 Mo. 398. See S. v. Weimer, 64 Iowa, 243, 20 N. W. 171.

29. Harrington v. P., 6 Barb. 607; S. v. Cardwell, Busbee, 245; Day v. S., 14 Tex. Ap. 26. See S. v. Gilmanton, 14 N. H. 467; S. v. Spainhour, 2 Dev. & Bat. 547; C. v. Belding, 13 Met. 10; Thompson v. S., 20 Ala. 54; McWhorter v. S., 43 Tex. 666; S. v. Glass, 42 Iowa, 56; Chicago v. Wright, 69 Ill. 318; Cemetery Association v. Meninger, 14 Kan. 312; Mankin v. S., 2 Swan, Tenn. 206.

30. Sullivan v. S., 52 Ind. 309; C. v. Belding, 13 Met. 10; Reg. v. Lordsmere, 15 Q. B. 689; C. v. Franklin, 133 Mass. 569; Reg. v. Berger, 1894, 1 Q. B. 823.

31. Ante, § 870; Rex v. Southampton, 2 Chit. 216; Reg. v. Clueworth, Holt, 339; Rex v. Loughton, 3 Smith, 575; Rex v. Lincombe, 2 Chit. 214. And see Rex v. Chedingfold, Cas. tempt. Hardw. 159.

INDEX TO SUBJECTS.

THE FIGURES—indicate the section and paragraph, the letters (i, ii and iii) the volume.

THE ITALIC LINES—and the word "full" denote that the reader is to turn to the body of the book and look along the section-heads for the minuter contents.

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